

ELECTION LAWS IN PAKISTAN

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## ABSTRACT

Under the Constitution of 1962 the Pakistan election law has assumed importance. This thesis gives a full account of the law of elections. The provisions, as contained in the Electoral College Act, the National and Provincial Assemblies (Elections) Act and the Presidential Election Act have been clearly stated, carefully examined and discussed in the light of decided cases. Chapter one deals with the system of elections; the President and members of the Legislatures are indirectly elected by an Electoral College, elected by adult franchise. Chapter two deals with the delimitation of constituencies and electoral units. Chapter three deals with suffrage, the law relating to the qualifications and disqualifications of voters and the electoral rolls. Chapter four is devoted to the candidate; in it are examined the qualifications and disqualifications for membership of the Electoral College and the Assemblies, and a statement of the law governing nominations. Chapter five describes the electoral process from notification of the poll to the declaration of the result. Chapter six deals exclusively with the election to the office of the President. Chapter seven deals with election offences examining their efficacy to ensure free and impartial elections. In chapter eight are discussed post election disputes, the law applicable to election petitions and the role of election tribunals. Chapter nine deals with the jurisdiction of superior courts in election matters.

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## CHAPTER 1.        INTRODUCTION

Pakistan is a member of the Commonwealth and until 1958 had a Constitution, enacted by a Constitutional Assembly, which was federal in form with legislators directly elected by adult citizens, Ministers being usually members of the Legislatures and the Provincial Governors were appointed by the Central Government; the head of the state and Governors generally acted on advice of Ministers. The Constitution basically conformed to the pattern set earlier in the other Commonwealth countries.

From 1958 to 1962 Pakistan was governed by "Martial Law" and in 1962, the present Constitution was promulgated by the military Government. On many points there has been a wide departure from the pattern in the other Commonwealth countries and in Pakistan up to 1958. The legislative power is decisively separated from the executive power, which is vested in the President, who, like the Legislatures, is elected indirectly by an Electoral College, which is elected by adult citizens.



Though much of the electoral law of the Commonwealth is still valid in Pakistan, the fundamental changes in the Constitution, set out above, has caused departures.

There is no book in existence, which adequately deals with the situation in Pakistan and I have selected "Election Laws in Pakistan" as the title of my thesis, because I wished to examine these matters, which have become important, through the changes in the constitutional structure and to give a full account of the present law relating to elections.

I have been encouraged to take up this task by Mr. Justice Mohamad Iqbal, Member of the Election Commission, and other learned Judges of the West Pakistan High Court. My thesis can be divided into four parts. In the first part, I have discussed the law of delimitation, the qualifications and disqualifications of a voter and the candidate to the Electoral College and the Assemblies. The second part deals with elections; one of its chapters discusses the procedure from the date of the notification of the poll to the declaration of the result, for elections to the Electoral College and the Assemblies: the other lays down, in extenso, the law with regard to election of the President. The third part enumerates the various election offences, which are framed to ensure, as far as possible, that the elections are free and impartial and the fourth part is devoted to election

disputes and the jurisdiction of Superior Courts in election<sup>11</sup> matters.

The law governing the conduct of elections was given to the Indo-Pakistan sub-continent by the British, and a number of its provisions bear a close similarity to the provisions of the English Representation of the People Act, 1949. There has been no major development in Pakistan and most of the provisions of the Government of India Act 1935, the Government of India (Provincial Elections) Corrupt Practices and the Elections Petitions Order, 1936, were retained in the Pakistan Representation of the People Act, 1957, the Basic Democracies Order, 1959 and the National and Provincial Assemblies (First Elections) Order, 1962, read with the Settlement of Disputes (First Elections) Order, also of 1962, culminating in the present statutes. This clearly indicates the importance of English and, for the same reason, the Indian decisions, which provide rich and instructive material for the interpretation of the various provisions.

It has been the author's endeavour to include all the latest case-law from Pakistan. In fact, it will be observed that it is only where there is a total absence of such decisions that recourse has been made to decisions of foreign courts. But care has been taken to use these cases

only if they are relevant to the law in Pakistan. It may be stated that although, after the creation of the Pakistan Federal Court and the abolition of the Privy Council jurisdiction, Pakistan is not bound by English decisions, they are even today referred to in the course of counsel's arguments and the judgments of the courts, provided they are applicable to the case under examination. The reference to Indian cases is discouraged both by the Supreme Court and the High Courts; where they have been dissented from, the decision of the Pakistani Court must be followed. But where there is no Pakistan decision, recourse has been had to Indian decisions, for, in relation to election matters, there is very little corpus juris in Pakistan.

It must be pointed out that the object of this study is to examine the legal rather than the political aspect of elections. But, as the indirect system of elections is a new development in the Indo-Pakistan sub-continent, which today is subject to some criticism in Pakistan, the political aspect cannot be entirely ignored and a few words about the system will not be out of place.

The object of the Electoral College System is to provide a simple and effective machinery, best suited, in the circumstances and conditions prevailing in Pakistan, to

ascertain the will of the people but to discourage activities which tend to disrupt national unity and to dissipate resources in time, men and money, which should be more usefully employed in the reconstruction and development of the country.

The main reason for electing the Assemblies and President through the Electoral College is that the country is not yet ripe for direct election, that the average adult is illiterate and ignorant; his knowledge is limited to local affairs; he does not possess the capacity to appreciate national issues; he cannot cast his vote with understanding and a sense of responsibility; he is further incapable of judging the suitability or otherwise of candidates, who do not belong to the district in which he lives. To quote President Ayub,

"without going to the hard core of our nation, at a really intimate level, every system of democracy in our country is bound to become a farce, as it did in the past. The large majority of our people live in villages; they are mostly uneducated and illiterate and, therefore, unable to exercise their right of vote except at their community or village level, where personal contact and the immediacy and urgency of individual and community interests make it practical and possible for them to judge people and elect only those in whom they have full confidence, based on personal knowledge of the candidates' background, temperament, behaviour towards other people, and past performance in general." (1)

In other words, it is considered desirable that members of the Assemblies ~~are~~<sup>should</sup> be elected by a select body of persons of higher calibre, ability and sense of responsibility. A primary voter has to choose an elector from among a limited number of people he knows and persons so selected form a more intelligent secondary electorate.

The 1956 Constitution had provided for direct election to the Legislatures and indirect election of the President. The Commission set up to devise a new Constitution, after its abrogation in 1958, advocated restricting the franchise to those citizens who (a) had attained a standard of literacy, enabling them to read and understand the published matter giving information about the candidates and b) possessed sufficient property or stake in the country to ensure that they would be satisfied, as reasonable men, that they were electing proper representatives; but it did not favour the idea of indirect elections in Pakistan (2). It was observed -

"the main ground on which an indirect election can be justified is that it eliminates, to some extent, the ignorance of universal suffrage, by restricting the ultimate choice to a body of select persons possessing a higher average of ability and consequently a keen sense of responsibility. The chief objection to this system, however, is that the voter, in the nature of things, will not be satisfied with the right of selecting

persons who are to select the representatives instead of making the selection. This satisfaction, in our opinion, would be keener in the matter of selection of such an important personage as the head of the state or his deputy, under the presidential form of government."

After pointing out the heavy responsibilities that would vest in a President in a presidential form of government, it observed -

"we are adopting a system under which there is going to be only one person at the head of the affairs and that person is going to be the chief executive, inextricably connected with the administration that affects the common man; it is necessary that he should command the confidence of the people, and such confidence would, we think, be forthcoming only in a direct election.... therefore, we consider the President, the vice-President, the House of the People and the Provincial Assemblies should all be directly elected."

Since the implementation of the recommendations would have taken some time and could not be completed before 1963, as the anxiety for an early return to representative government, was growing and it was not in the interest of the armed forces that Martial Law Administration should continue, the Commission considered that the first elections should be indirect. But it made its intention quite manifest in the following terms:

"We should like to make it clear that we are accepting this electorate, for the first term of only three years, to facilitate reversion to a representative form of government before the end of the year. In order that the election for the

second term, that is to say, the term of four years, following the first term of three years, should be direct on the restricted franchise indicated already, we have recommended that the Franchise Commission should be appointed, immediately, with the direction that it should submit its report within one year... the President, should however, take a final decision on the recommendation, made by the Committee... that the elections should be by separate electorates and direct on restricted franchise... should be incorporated in the Constitution and this matter should be open to any further discussion. The point for consideration, on the submission of the report of the Franchise Commission should be only whether the standards fixed by them should be accepted or modified." (3).

So far, so good. The 1962 Constitution was promulgated in June of that year; it was clear that the recommendations of the Commission were not given effect to. ARTICLE 165 clearly provided -

"an election to the office of the President shall be decided by the votes of the Members of the Electoral College." (4)

ARTICLE 168 (1) provided that the election of a person to a seat in the Assembly should be decided by the votes of the constituents of that seat and under ARTICLE 164, elections and referendums (sic) to be held under the Constitution should, subject to the Constitution, be conducted and decided in such manner as was provided by law. ARTICLE 157 laid down that

3. Ibid, at p.78.

4. Constitution of Pakistan (1962), ART.165 (1).

every citizen, who had attained the age of 21 and was not of unsound mind, was eligible to vote; thus the idea of a restricted franchise was abandoned.

The report of the Franchise Commission was published more than a year after the promulgation of the new Constitution, which provided for indirect election of the President; this provision could only be amended by a two-thirds majority in the Legislature, as mentioned in the Constitution itself. According to this Commission, the circumstances and conditions prevalent in the country favoured universal adult franchise; it upheld the principle of direct elections to the Assemblies and the office of the President; it agreed with the Constitution Commission that elections be held indirectly as an interim measure.

The chief argument in favour of indirect elections is that the average adult is illiterate, ignorant and consequently incompetent to vote for membership of the Assembly or the President. It is submitted that the argument is not sustainable for the following reasons. The Pakistan Constitution does not prescribe any educational qualifications for a candidate to the Electoral College or an Assembly; no adult is debarred or disqualified on the ground that he is illiterate



or ignorant. Thus illiterate and ignorant, but otherwise qualified persons, who can command the confidence of the primary voters in their constituencies or secure the voters' support by reason of their wealth and influence, may succeed at the primary election, and become secondary voters to elect members of the Assembly. The overwhelming majority of the primary voters are illiterate; the percentage of literacy in Pakistan is about 20 per cent, including children and minors of all ages, who form nearly half of the population; over 85 per cent of the total population live in rural areas. As secondary voters will be elected from amongst the primary voters, it is reasonable to infer that a substantial number of secondary voters too will either be illiterate or possess the bare ability to read and write. Thus it is difficult to see how the secondary voters, who are not superior to the average adult in calibre, ability and responsibility, can have a better idea of provincial and national issues and become more capable of judging the fitness of candidates for membership of the legislatures, or the President. It is not practicable to impose any high educational qualifications on candidates for membership of the Electoral College because, in view of the widespread illiteracy in the country, particularly in rural areas, the required number of adults with the prescribed educational qualifications may not, in many cases, be available.

Persons from outside, who are not resident in the electoral unit concerned cannot be allowed to become candidates at the primary elections, in view of the residential qualifications imposed by the Constitution. Moreover, the candidature of such a person will indicate the principle that adults of a local area are to elect a person as a secondary elector from amongst themselves and whom they know personally.

Before the Franchise Commission indirect elections were advocated on the ground that they were less expensive than direct elections. On an examination of the procedures under both systems it was found that the volume of work was more or less the same. The Commission repelled the argument on the grounds -

- a) that an indirect system of election contemplated two elections instead of one, which entailed additional expenditure,
- b) that elections to the electoral college and assemblies having been prescribed by the Constitution, each required the same degree of meticulous care and strict conformity with the laws and regulations as the other; this needed a bigger and better trained staff and
- c) that under a direct system, elections are held simultaneously, which will cut down election costs.

The reasons given are adequate but it may be submitted that even assuming, without conceding, that in the case of direct

elections expenses would be more, that by itself should not be the determining factor for discarding a system which otherwise has merits. Another argument in favour of indirect elections is that an indirect election has the effect of diminishing false personation and "bogus" voting; but the possibility of the Commission of these malpractices is not completely ruled out. Though personation prevailed to a large extent in the 1964 elections to the Electoral College, there were instances of its commission in the elections of the Assemblies and the President. It may be mentioned that our laws have made adequate provisions to combat this and other corrupt practices. To see that they are given effect to depends on the people themselves and the election machinery should be such as to ensure that the penalties prescribed thereunder are strictly enforced and complied with.

Direct elections, on the other hand, have some clearcut advantages.

The first and foremost is the satisfaction that a voter gets from recording his personal preference in the election of his representative to the legislature. Besides, such direct participation in the election is a step in his political education; the adult has thus the opportunity to have his views considered in the Legislatures on matters connected with

the government and the administration of the country. In the indirect system, the elected representative is twice removed from the primary voters and remains out of touch with them. The result is that the representative is not aware of the wishes of the primary voters and such voters have no means of exercising pressure on the representative to ensure that their wishes are carried out by him. This is the main drawback of the indirect method; it tends to retard the spread of political education among the masses, which is essential for the development of representative government on sound lines. In fact, such a system is not truly representative in character, as it fails to secure the representation of the views of primary voters. There exists no direct link between the people and the representative.

Moreover, when elections are held indirectly, as they are at the present time through the Electoral College, all recognised parties and the prospective candidates attach supreme importance to the primary elections, inasmuch as the fate of the secondary election depends, to a considerable extent, on the result of the primary election to be held on the basis of adult suffrage. They contact voters in the urban as also the rural areas, work among them and make every possible endeavour to

secure the return of secondary electors from among their supporters. At the secondary election, the members of the Electoral College, vote for their own parties or groups. If at the primary election a particular party is able to secure the return of its own supporters from the majority of the electoral units within a constituency of an assembly, that party will be reasonably assured of its own candidate being elected at the secondary election to the membership of assembly from that constituency. If a political party is able to secure, at the primary election, the return of its own candidates in more than 50 per cent of the constituencies, that party, unless it is betrayed by its own returned candidates at the secondary election, will be in a dominating position, in a position able to dictate who shall be elected as members of those constituencies. Such consequences will be inevitable, when political parties are well organised and have strong roots among the masses. The result of the primary elections will determine the result of the secondary elections; casting of votes at the secondary election will become a formal affair and will not encourage political interest or education among the primary voters.

The matter does not rest there. For elections to the Electoral College the country is to be divided into 80,000

electoral units or to quote from ARTICLE 155 of the Constitution "each province shall in accordance with law, be divided into not less than forty thousand territorial units" (5). In fact, by a Bill introduced in the National Assembly, whereby the Constitution is sought to be amended, the number of electoral units is being raised to 60,000. The size of each unit is small and the primary voters limited in number. It will be easy for interested persons to win them over by unfair means, such as the exercise of undue influence, to secure the return of their own candidates at the primary election. It is interesting to note that in response to the questionnaire issued by the Franchise Commission of 1963, the majority of persons who replied, and they included, inter alia, a good number of "basic democrats" (members of the Electoral College), (6), complained that in the first indirect elections to the Assemblies under the 1962 Constitution, they were generally bribed or induced and in some cases forced into submission by pressure, undue influence and similar tactics. In this respect the Commission remarked -

"It is mainly on the ground of corruptibility of the secondary electorate that the overwhelming evidence is strongly opposed to the system of indirect election." (7)

5. Constitution of Pakistan (1962)ART.155 (1).
6. Conducted under the National and Provincial Assemblies(First Elections)Order, being President's Order 4 of 1962.
7. Report of the Franchise Commission, 1963 published in the Gazette of Pakistan (Extraordinary), 23rd August 1963, p637w.

Not oblivious of the consequences that could arise from a corrupt electorate, it observed -

"If the secondary electorate, as evidence before us indicates, is corruptible, the danger is that the primary voters, in their turn, may demand gratifications from the candidates at the primary election as consideration for their support for them. In this way, a vicious circle, it is apprehended will grow which may corrupt the nation." (8).

Indeed the apprehensions were not devoid of any basis. In the 1965 elections to the Assemblies, and also the office of President, the price of a vote of an elector ranged from Rs3000 to Rs10,000, thus making a mockery of free elections. While not denying that malpractices would also be indulged in under a direct system of elections, such practices cannot be so rampant and decisive in effect as in indirect elections.

These then are some of the merits and demerits of direct and indirect elections. As there is strong and widespread dissatisfaction with the indirect system in Pakistan, it is submitted that elections there should be held on the basis of adult suffrage. In the alternative, there must at least be direct elections to the Assemblies and the President may be elected by the Electoral College. It is submitted that it would be better to have an election of the President by an

Electoral College of 120,000 elected under the provisions of the Electoral College Act, rather than by a small Electoral College consisting of members of the Assemblies, as was the case under the 1956 Constitution. However, as mentioned earlier, the title of my thesis is "Election Laws in Pakistan" as distinct from "Elections in Pakistan" and it is not necessary to pursue the matter any further. We are concerned here with the study of the laws relating to three principal elections in Pakistan, to the Electoral College, the National and Provincial Assemblies and the office of President, and it is proposed to set them out in the following chapters.



Chapter 2DELIMITATIONGeneral

The valid delimitation of constituencies should be a pre-requisite of a valid election for, if it is not properly carried out, it could make a fair election quite impossible. Electoral rights would lack substance, if representation in Parliament were not fairly and evenly distributed among the electorate(1).

There are three possible ways in which constituencies can be arranged. According to one plan, constituencies may be delimited with the deliberate object of depriving the people of fair representation, that is, by fixing the boundaries in such a manner as to ensure that the party responsible for the delimitation secures the majority of elected candidates. A second plan is to arrange constituencies arbitrarily but without any reference to the views of the voters in such a way as to leave the general results to chance. The third method is to endeavour to achieve a numerically accurate and proportional representation of the electorate.

1). Lawson and Bentley, Constitutional and Administrative Law(1964), p.95.

Although delimitation may be on a territorial basis or a mixture of bases, the normal practice is to have a single set of territorial constituencies(2). This, according to Prof. Mackenzie, the learned author of Free Elections, is important in two ways. Firstly, the way in which boundaries are drawn affects the general character of the Assembly; it decides the sort of units on which members depend for election and which they are supposed to represent. Secondly, delimitation may affect the fortunes of individuals and political parties, because the distribution of votes between constituencies influences their effectiveness(3).

Before examining the law relating to delimitation in Pakistan, it is proposed to refer briefly to the position obtaining in England.

The law on the point is contained in the House of Commons(Redistribution of Seats) Act, 1949 as amended by the Act of 1958. The delimitation of the country into constituencies is entrusted to the following four boundary commissions: a Boundary Commission for England, a Boundary Commission for Scotland, a Boundary Commission for Wales and a Boundary Commission for Northern Ireland(4).

2). MacKenzie, Free Elections(1958)p.12.

3). Free Elections(1958)p.108.

4). House of Commons(Redistribution of Seats) Act, 1949, S.1.

The Speaker of the House of Commons acts as Chairman of each of the aforesaid Commissions and is assisted by a Deputy Chairman, who must be a Judge and is appointed by the Judiciary(5). The Commission is required to submit its report to the Secretary of State with respect to the whole of that part of the United Kingdom which is under its jurisdiction, either showing the constituencies into which they recommend it should be divided or stating that no alteration should be made to the already existing constituencies(6); such a report is required to be submitted not less than ten or not more than fifteen years from the date of submission of its last report(7). The Secretary of State must prepare a draft of the Order in Council to be laid before the Parliament, which, after approval from both Houses, is submitted to Her Majesty in Council for final orders. The validity of the Order in Council is immune from challenge in any legal proceeding(8). So Evershed, M.R., in

5). House of Commons (Redistribution of Seats) Act, 1958, S.1.

6). House of Commons (Redistribution of Seats) Act, 1949, S.2.

7). House of Commons (Redistribution of Seats) Act, 1958, S.2.

8). Ibid., S.3(7).

Harper v. The Secretary of State(9), said,

"My reading of these rules and the whole Act is that it was quite clearly intended that, in so far as the matter was within the discretion of the Commission, it was certainly to be a matter for the Parliament to determine. I find it impossible to suppose that Parliament contemplated that on any of these occasions, when reports were presented, it would be convenient for the court to determine and pronounce on whether a particular line which had commended itself to the Commission was one which the Court thought to be best or the right line whether one thing rather than the other was to be regarded as practicable and so on. If it were competent for the courts to pass judgements of that kind on reports, I am at a loss to see where the process would end and what the function of the Parliament would turn out to be."

In other words, with respect to delimitation the matter has

- 9). (1955) 1 Ch. 238<sup>at p. 251</sup>; in this case the draft Order had been approved by the Houses of Parliament but had not been sent to the Queen by the Home Secretary. The petitioner prayed for an injunction restraining the Home Secretary from so submitting the Order to Her Majesty in Council as the Commission did not comply with the rules set out in the Second Schedule to the Act and that it was not, therefore, a report under the Act within S.2(5); and that the Home Secretary was not bound by S.3(4) to submit the draft Order to Her Majesty in Council. An interim injunction was granted but was recalled on appeal.

been placed solely within the jurisdiction of Parliament. The Commissioners do not decide; they enquire, hold hearings and decide what proposal to lay before the Parliament in the form of a draft Order In Council, which requires the assent of both Houses of Parliament; the ultimate decision depends on voting on party lines. This is different from appointing an independent judicial body for delimitation of constituencies.

The system of delimitation is open to objection on the ground that, for instance, a constituency in North-East England will always return a Labour candidate by <sup>a</sup> large majority, whereas a constituency in Bournemouth town would invariably return a Conservative member by a large majority. The effect <sup>of</sup> this is to disfranchise the Conservative voters in North-East England and Labour voters in Bournemouth. But this difficulty cannot be overcome, unless a system of proportional representation is introduced and territorial constituencies are abolished. A danger which has to be guarded against, when there are territorial constituencies, is "gerrymandering", that is delimiting the boundaries of constituencies for the benefit of a particular party. Though it is probably true to say that this practice is not indulged in England, the provisions of the Pakistan Constitution and the law, relating to delimitation, contemplate

more frequent rectification of constituency boundaries and whereas, as stated above, the ultimate decision is taken by the Parliament in England, the Pakistan National Assembly has no say at all.

### Electoral Units

In Pakistan the delimitation has to be carried out to determine both electoral units and constituencies, the former for the purpose of the elections to the Electoral College and the latter, by consolidating electoral units, to establish constituencies for elections to the Assemblies.

Under ARTICLE 155 of the Pakistan Constitution of 1962, a Province is to be divided into at least 60,000 territorial units(10). The number of such units must be the same for East and West Pakistan. Delimitation Officers and assistant Delimitation Officers are appointed from among Government Servants(11), to delimit the Provinces into electoral units under the superintendence and control of the Chief Election Commissioner(12). By virtue of the power vesting in him under S.3 of the Electoral College Act, the Chief Election Commissioner has delegated his authority to Provincial Election

- 10). Vide the Electoral College(Second Amendment) Act 17 of 1967, after the necessary amendment in the Constitution. The number was originally fixed at 40,000.
- 11). Electoral College Act, S.5, as amended by Act 17 of 1967. Before 16.12.67 there was no provision for the appointment of assistant Delimitation Officers.
- 12). Electoral College Act, S.6(1).

Authorities(13).The delegated authority is subject to such general or special instructions as may be issued from time to time(14).A preliminary list is required to be prepared and published specifying the areas which the Delimitation Officer intends to include in each electoral unit;objections and suggestions are invited from the public and should be filed within seven days of its publication(15).

The relevant provision in the Electoral College Act is S.6(3),which provides:-

"the electoral unit within an area shall be delimited having regard to the territorial unity and so far as practicable, to the distribution of population and administrative convenience."

(the underlining is by the author)

It may be observed that delimitation is required by law to be carried out on a territorial basis(16) and the distribution of population and administrative convenience should be taken into account "so far as practicable".

"Territorial unity" and "administrative convenience" have not been defined in the Act,so it will be necessary to find out the meanings assigned to these expressions by

13). Notification F2(10)64-ELS dated 26.5.64.

~~15)xxxElectoralCollegeAct,S.6(5)~~

14). Notification F2(5)64-ELS dated 28.4.64.

15). Electoral College Act,S.6(3),Electoral College Rules,r.3.

16). Under Art.17 of the Basic Democracies Order,1959,delimitation of the wards(as they were then called) had to be carried out on the basis of distribution of population.

the Judiciary.

Before the East Pakistan High Court, Md. Salam v. Chairman Election Authority(17), the only case relating to the delimitation of electoral units, involved the interpretation of the above-quoted provision, namely S.6(2) of the Electoral College Act. The petitioner complained that its provisions had been violated by the authority and the delimitation was liable to be set aside. It may be mentioned that this case, besides providing an interpretation to subsection(2) of S.6, shows that the Judiciary in Pakistan has exercised its jurisdiction in a delimitation matter, which is not the position in India and England. But in view of the pronouncement of the Supreme Court in Jamal Shah v. Member Election Commission(18) and Akbar Ali v. Raziur Reman(19) and of the High Court in Dost Md. v. Returning Officer(20) and Arif Iftkar v. Election Tribunal(21), it is doubtful whether a High Court would be inclined to issue a writ so readily as one would have imagined when they purported to exercise jurisdiction in Md. Salam v. Chairman Election Authority(22). But as the

17). P.L.D.1965 D.231.

18). P.L.D.1966 S.C.1.

19). P.L.D.1966 S.C.492.

20). P.L.D.1965 L.560.

21). P.L.D.1968 L.1387.

22). P.L.D.1965 D.231.



writ jurisdiction of the High Court under ARTICLE 98 may be exercised in exceptional cases(to be discussed in the Chapter on Jurisdiction of Courts),the position would seem to remain unaltered;there is no clear cut policy as in England(already stated)that the jurisdiction of courts is completely ousted(23).Contributing with the case under discussion,the interpretation palced by Chaudhury and Abdulla,JJ.,is as under:

"A plain reading of subsection(2) is that the electoral units shall be delimited. To this extent it is mandatory.Further requirement,however,is that the delimitation shall be effected"having regard to the territorial unity".The expression "having regard to" means bearing in mind or taking into consideration.Therefore, the requirement is to bear in mind the question of territorial unity.It is nowhere provided that the territorial unity shall be maintained in all circumstances. No such assurance can be read in the said provision.Territorial unity has ideed been made a basic consideration but it is not an absolute requirement of law."(24)

23). Although ART.171(3) excludes the jurisdiction of Courts in regard to delimitation of Constituencies and Zones for elections to the Assemblies,the ban does not extend to electoral units for the Electoral College.

24). P.L.D.1965 D.231 at p.235.

With respect to the contention of ~~the~~ counsel that the words "territorial unity" are not qualified by the words "so far as practicable" and that the latter expression had reference to "distribution" of population" and "administrative convenience", it was observed:-

"A reasonable explanation of these words is that the mind should invariably be applied to the territorial unity but the question of distribution of population and administrative convenience should be taken into account when it is possible to do so. The language was designed to convey the difference in the degree of requirement for the consideration of these elements in delimiting the units." (25)

Although this interpretation may seem to be too literal on first examination, it is submitted that it is quite correct. The learned Judges had been called upon to construe the subsection as meaning that, in fixing boundaries, the delimitation officer was obliged to maintain "territorial unity". But the language used did not justify that. It has, however, been held in the United States of America that the purpose of statutes providing for the consolidation, division or arrangement of election districts or precincts is that

they shall be established and maintained according to the standards fixed in the statute(26). May be a court should interpret electoral laws liberally but it should not be inclined to interfere, unless things are not done in conformity with powers conferred and limitations ~~pe~~lced thereon. In this connection it is useful to mention the decision of the West Pakistan High Court in A.M.K. Leghari v. Government of West Pakistan(27), where it has been held that an electoral right is the creation of the statute and is subject to the limitations imposed by it; it is not for the courts to vary, add to or subtract from those limitations.

The expression "administrative convenience" means the convenience of the executive officers of the Government who, when an election is held, will have to conduct it; we have already seen that delimitation officers are appointed from among officers of the Central and Provincial Government, under S.5 of the Electoral College Act. In his treatise of Free Elections, Professor MacKenzie has stated the position thus:-

"Unity of administrative area is relevant partly because it reflects (and perhaps creates) community of interest but the same criterion is important for convenience

26). *Morb v. Fox*, S.W.R., Second Series, 98.

27). P.L.D. 1967 L.227.

in managing the elections. Elections must in general be seen by officials engaged also on other administrative business; it adds to their difficulties if electoral boundaries cut across the boundaries to which they are accustomed. If this happens every thing has to be constructed afresh for this single purpose-chain of command, channels of communication, register, statistics- and in the process there can be much loss of time and efficiency. It therefore helps administrators if the smallest administrative districts are used as bricks out of which to build constituencies." (28).

Certain other factors should also be kept in mind while delimiting electoral units and are as follows:-

- (1) the area must be contiguous;
- (2) it should, as far as practicable, be a compact block;
- (3) administrative boundaries such as districts, tehsils, thanas (police stations) and "patwari circles" should be respected;
- (4) homogeneity in relation to tribal, lingual and place of origin, for example a group of refugees from India settled in a block should

be respected as far as possible;and  
(5)facility of communication should be kept  
in mind.(29)

From the above it may be deduced that delimitation, in respect of electoral units,is to be effected on the basis of territorial unity,common social,economic and political interest of groups of people living in the area and administrative convenience.The overriding consideration must be to ensure adequate representation of those groups, whose interests are or are deemed by them to be common, so long as their number justify it.Separate representation should be given to such groups provided that the principles of contiguity,compactness and facility of communication for administrative convenience are not violated.It may be difficult to maintain territorial unity and at the same time to ensure adequate representation of groups mentioned;the Delimitation Officers would be well advised to lean in favour of the latter.Where local feeling is acute,it may prove impossible to divide a geographical area so as to ensure adequate representation of all groups living there in the Assembly.

At the last elections,the Chief Election Commissioner, Pakistan issued direction to the Delimitation Officers to maintain equality of population while demarcating electoral

units. The average population for each unit in East Pakistan came to 1,275, whereas in West Pakistan it worked out at 1,072 on the basis of the 1961 Census figures(30); the population of East Pakistan was 5,08,40,235 and West Pakistan 4,28,80,378; the number of electoral units for each province was 40,000. For future elections, the number of electoral units has been increased to 1,20,000, that is sixty thousand(60,000) for each province, which would mean that an electoral unit would have comparably few persons.

Objections to the preliminary lists of electoral units are heard by the Delimitation Officer(30), who, after hearing the parties and making such enquiries as he deems necessary, must send concise reports to the appellate authority, appointed by the Chief Election Commissioner for final determination of such objections and suggestions (31). It may be pointed out that the law has omitted to lay down the procedure for an enquiry before the appellate authority, so that he would be inclined to endorse the report of the delimitation officer; this is not a proper way to dispose of the matter. Any amendment or correction

30). In all 7,299 objections and suggestions were received in East Pakistan out of which 2,910 were accepted; in West Pakistan they numbered 10,331 of which 3,257 were accepted (Report on General Elections in Pakistan 1964-65, Vol. 1, p. 67).

31). Electoral College Rules, rr. 3, 4 read with Electoral College Act, S. 6(3) and (4).

necessitated by the order of the appellate authority must be carried out by the Delimitation Officer(32).

Subsection(5) of S.6 of the Electoral College Act provides:-

"The Delimitation Officer shall make such amendments, alterations or modifications in the preliminary list published under subsection(3) as may be required by any decision on any objection or suggestion and also make such other amendments, alterations or modification in the said list as may be necessary for correcting any error or omission."  
(the underlining is by the author)

The term "decision" would seem to refer to the determination of the objections and suggestions of the appellate authority. The words "and may also make such other amendments, alterations or modifications in the said list, as may be necessary for correcting any error or omission" call for further concern as they tend to confuse the meaning of the subsection.

The list as corrected and amended is published and becomes the final list of the electoral units for the area(33).

As movements of population call for changes in the boundaries of units the Electoral College(Second Amendment) Act, 1967 has empowered the Chief Election Commissioner to call for the record of <sup>the</sup> delimitation of any electoral unit and direct the Delimitation Officer to correct any error

32). Electoral College Act, S.6(5); Electoral College Rules, r.4(3)

33). Electoral College Act, S.6(6); Electoral College Rules, rr.4(4) and (5).

or to bring the delimitation into conformity with his directions. The Delimitation Officer must modify the delimitation and the list relating thereto accordingly and publish the modified list in the prescribed manner.

### Constituencies

The law enacted by the National and Provincial Assemblies (Elections) Act may now be examined. S.2(7) defines a "constituency" as meaning any one of the groups into which the electoral units of a Province have been divided under S.3 of the Act, or one of the zones into which a Province has been divided under S.4 of the same Act. It would be better, therefore, to deal separately (but briefly) with the delimitation of constituencies for the general seats to the Assemblies and the special seats reserved exclusively for women candidates.

For elections to the National Assembly of Pakistan, the Chief Election Commissioner must arrange the electoral units of each Province into 75 groups called central constituencies; it must be ensured that each constituency is an undivided area. Similarly each Province is to be divided into 150 constituencies for elections to the Provincial Assemblies (34). Like the electoral units, the central and

34). Constitution of Pakistan, ARTS. 160, 161. Both the numbers are being increased (statement by the Law Minister in the National Assembly).



provincial constituencies should also be delimited having regard to the distribution of population and administrative convenience, in so far as practicable and each constituency must be an undivided area(35). The person responsible for the task of delimitation is the Chief Election Commissioner himself. A preliminary list showing the electoral units that are proposed to be included in each constituency is first published with a notice inviting objections and suggestions (36); they must be lodged with the Chief Election Commissioner, who will either hear them or refer them for consideration to a member of the Election Commission. No detailed procedure is prescribed as to the mode of enquiry but in practice the objection is heard and carefully considered. It is essential that the preliminary list must be amended or modified in the light of such decision. It may be mentioned that the Chief Election Commissioner (and presumably his delegate) has suo motu power to amend, alter or modify the preliminary list for the purpose of correcting any error or omission. The final list shows the electoral units included in each constituency(37).

In the last elections to the Assemblies the entitlement of various districts was worked out to a group consisting on the average of 533 electoral units for a seat to the

35). National and Provincial Assemblies (Elections) Act, S. 3(1);

36). Ibid. (37). Ibid., S. 3(3).

National Assembly. A seat in the Provincial Assembly from the former Panjab area of West Pakistan represented 358 units, while in other areas of West Pakistan the ratio was 1:206. A seat in the Provincial Assembly of East Pakistan represented 267 electoral units (38). In calculating this allotment .5 or above was considered as entitlement to a seat, while less than .5 was generally ignored; in cases where the fraction was between .4 and .6 adjustments were made, the excess units being combined with the units of an adjoining ~~deficiencyxxxdeficiencyxxxEast~~ deficiency district; in the case of sparsely populated areas, such as the Kalat division, a number of districts were combined to form one constituency. In East Pakistan, allocations were made on the basis of provincial seats; each district was allocated a whole number of provincial seats on the basis of its entitlement. The central constituencies in East Pakistan were formed by combining two adjacent provincial constituencies into one central constituency. As far as possible, the district and divisional boundaries were respected, while grouping two provincial constituencies into one central constituency (39).

The Chief Election Commissioner decided that for securing administrative convenience, boundaries of administrative

38). Report of General Elections in Pakistan 1964-65, Vol. 1, p. 129.

39). Ibid., at p. 134.

units should, as far as possible, be respected. An attempt was made to keep the "thanas" in East Pakistan and ~~24~~ "tehsils" in West Pakistan unbroken. They were, however, split up whenever more than one seat could reasonably be allotted to a "thana" or a "tehsil" or where, but for the splitting up of that unit, the resultant disparity would have been beyond reasonable limits. Whenever a "tehsil" had to be split up in West Pakistan, the parts were, as far as possible, so demarcated as to contain the whole police station area. In East Pakistan the matter presented little difficulty, for, without departing significantly from the average allocation of units per seat, constituencies were formed from one complete "thana" or a combination of complete "thanas". But in doing so, in some cases, contiguous parts belonging to two different divisions were combined to form a central or a provincial constituency. No "thana" except one was split up in forming a constituency. The problem in West Pakistan was much more complex, particularly in the old Panjab and the Frontier areas; this was partly due to the different standards applicable to the different regions under the Constitutional provisions. In tribal areas, the Agencies were given at least one seat each in the Provincial Assembly but they had to be combined for central seats.

Doubts were expressed whether, under the Constitution, tribal areas could be combined with settled territory for the formation of a central or provincial constituency but the law made it clear that it was possible to do so.(40).

One hundred and thirty-five representations from West Pakistan and one hundred and forty-six from East Pakistan were received. They were published together with the preliminary list of constituencies. Within the time allowed to file objections and suggestions, one hundred and fifty-four representations were received from East Pakistan and six hundred and eight from West Pakistan. While considering objections and suggestions to the delimitation proposals, every interested person was allowed to be present at public hearings conducted by the Chief Election Commissioner or by the members, to whom power was delegated; free discussion was allowed and parties were invited to make concrete proposals; wherever such a suggestion was put forth it was accepted; where obvious mistakes came to light as a result of an objection or otherwise, they were rectified.(41).

40). Report of General Elections in Pakistan 1964-65, Vol.1, p.135.

41). Ibid., at p.136.

Zones

The Pakistan Constitution is exceptional in providing special seats for women in the Assemblies(42).For this purpose the Chief Election Commissioner is required to divide the two Provinces into six zones,three from each province,for election to the seats in the National Assembly reserved exclusively for women.In the case reserved seats for each provincial Assembly,a Province should be divided into five zones(43).Procedure similar to that envisaged for delimitation of constituencies for the general seats is followed;a preliminary list of zones showing the constituencies included in each zone,is published and notices inviting objections or suggestions within a specified period are called for;the objections are heard and disposed of in a summary fashion;amendments and corrections must be carried out accordingly.The final list when published forms the basis of elections to the reserved seats(44)..

42). ART.162.

43). The number is proposed to be increased for future elections.

44). National and Provincial Assemblies(Elections)Act,S.4; Directions for Elections to the Seats Reserved Exclusively for Women(The Provincial Assembly of West Pakistan Manual(1965)).



In the Indian Constitution there are no seats reserved for women but provision exists for establishing special seats for the scheduled castes or tribes(45).On the question whether control of delimitation of special constituencies was to be exercised by the Legislature or the Judiciary,India followed a pattern based on English practice. Article 327 of the Constitution empowers Parliament to make laws relating to delimitation and Article 329 gave no jurisdiction to the courts to call in question such a law.In N.P.Bonnuswami v.Returning Officer(46) it was held that the jurisdiction of the Court in the matter of delimitation was barred.

Before the enactment of the Delimitation Commission Act of 1952,the procedure was contained in S.13 of the Representation of the People Act,1950 under which the delimitation Orders issued by the President were subject to amendment by the Parliament.It was thought to be essential that the task of delimitation should be undertaken by an independent body,whose delimitation should be final.So the 1952 Act transferred the work to the Delimitation Commission,consisting of the Chief Election Commissioner and two past or present Judges of a Superior Court.(47).

45). The Constitution(Scheduled Castes)Order,1950.

46). (1952)1 E.L.R.133.

47). Delimitation Commission Act,1952,S.3.

S.4 of the Act of 1952 excludes any interference by Parliament; the final order does not require the approval of Parliament but is placed before it after it has been published and become law(48).

The Constitution provides safeguards against "gerrymandering" of constituencies. Under article 81 a strict maximum and minimum in respect of population is prescribed for every parliamentary constituency; article 173 prescribes a constitutional minimum for every assembly constituency. The ratio between the population of each constituency and the number of seats allotted ~~to~~ is required to be maintained throughout the Union or the State, as the case may be(49).

48). Ibid., S.9.

49). Constitution of India, Arts. 81, 82 read with Art. 70.



General

Suffrage is the right of a particular voter to vote at an election. It is a precious right which has been vigorously sought by those to whom it has been denied. A disenfranchised group is at a disadvantage and cannot claim the same opportunities for public employment, the same chance of rising to power and the same self-respect as are claimed by those who vote. According to Prof. Mackenzie it is the basis of government within a political community(1). We generally come across the word "suffrage" preceded by the adjectives, such as, "universal" and "equal", which might give the impression that every adult, ipso facto, becomes entitled to vote. This, however, is not quite true, for there may be limitations on franchise even under adult suffrage. To be an elector entails ~~dis~~qualifications, and it would be necessary to find out what are the qualifications and disqualifications of a voter(2) in Pakistan, where the Constitution requires adult franchise(3).

1). Free Elections, (1958) p.20.

2). In view of the indirect system of elections, a member of the Electoral College, who elects the President and members of the Assemblies is referred to as an elector in Pakistan.

3). ART., 157.



But before proceeding to do that, a brief history of the evolution of franchise in the country, since the Government of India Act of 1919, will perhaps be useful.

The development of the franchise in the Indo-Pakistan from the beginning envisaged universal adult franchise as the ultimate objective but the concept of franchise during the alien rule had a different connotation from what it has now. While the British Indian Government was not dependent on the will of the people, a certain amount of political satisfaction, specially of the vocal classes, was aimed at, so that there might be as little friction between the rulers and the ruled as possible. Therefore, no serious consideration was given to the association of the people in general with the governance of the country, as long as the educated and the propertied classes could be kept satisfied by allowing them to participate in elections to the Legislatures. These classes were first given the right of vote and the right was generally extended; it was stressed that the extension of the franchise beyond that limit was not administratively practicable; adult suffrage was not allowed to be fully achieved.

The Government of India Act of 1919 created a bicameral legislature at the Centre. The lower chamber, called the Legislative Assembly, had twenty-six official members, fourteen nominated non officials and one hundred and five

elected members. The upper chamber, called the Council of State, had twenty-seven nominated members of whom twenty were officials and thirty-three elected members. Under this Act a somewhat higher property qualification was required of voters at elections for the Central legislature but for provincial legislature a comparatively small payment of rates or taxes sufficed. Under electoral rules made under this Act, women became entitled to vote for candidates for election to houses of the legislatures except the Council of State.

Under the Government of India Act, 1935, the Central executive and legislatures set up by the Act of 1919 were retained. Provincial legislatures were bicameral in six provinces, including Bengal, where an important section of the population favoured a second chamber. The upper chamber was called the Legislative Council; in Bengal it had sixty-four members. North West Frontier, Panjab and Sind each had a single-chambered legislature, called, as was the lower chamber in a province with a bicameral legislature, the Legislative Assembly; the Bengal Assembly had two hundred and fifty members and that in North West Frontier fifty. The franchise was extended but the qualifications were not the same in all provinces. For election to a Legislative Assembly, payment of a prescribed amount of taxes, occupation of property of a prescribed value,

service in the forces and educational attainments were among the qualifying factors in the case of a male; his qualifications enfranchised his wife and literate women could vote. For elections to a Legislative Council, a voter was required to have held high public office or to possess property of same value. Of the adult population, about forty-three per cent of males and ten per cent of females were thus enfranchised. Communal representation was pushed to the length of creating special constituencies, not only for Muslims but also for Sikhs, Anglo-Indians, Europeans, Indian Christians, commerce, landholders, universities, labour and women(4).

Under the terms of the Indian Independence Act of 1947, the subcontinent was divided into the dominions of Pakistan and India; their Constitutions continued to be governed by the Government of India Act, 1935, to the extent adapted by each Constituent Assembly.

The Cabinet Mission Plan, 1946 had set up a Constituent Assembly for the whole of India, on the basis of one member for a ~~member~~ population of approximately one million. This Assembly was elected by the members of the provincial Assemblies voting under a system of proportional representation with the single

4). Alan Gledhill, Pakistan (1967) p. 37.

transferable vote;the members of the Provincial Assemblies were elected directly on a restricted franchise.

The Muslim members of the pre-partition Indian Constituent Assembly from areas,which now comprise Pakistan,along with the non-Muslim elected members of those areas,formed the first Constituent Assembly of Pakistan.

As stated earlier,the Government of India Act had provided for a restricted franchise for the provincial Assemblies.But on the eve of the Provincial elections in the Panjab,the Act was amended and adult franchise ~~forxxh~~ introduced in the country(5).Each of the then existing provinces of Pakistan had conducted a general election to its provincial Assembly by 1954.The second Constituent Assembly of Pakistan was elected in 1955,on very much the same basis as the first,with the newly-elected provincial Assemblies as the electoral college. The number of the members of this Assembly was restricted to eighty;the number of the members of the first Constituent Assembly was sixty-nine(later increased to seventy-nine).

In 1956,Pakistan became a Republic and promulgated its first Constitution.It provided for elections to the Assemblies on the basis of adult franchise and<sup>h</sup>the office of President through an electoral college comprising the members of these Assemblies.The Election Commission appointed thereunder

5). Constituencies(Adult Franchise)Act,1951.

made the necessary preparations for holding the elections, scheduled to be held in 1958-59. But Before these elections could be held, the Constitution of 1956 was abrogated by the proclamation of 7th October, 1958. While explaining the circumstances which led to the abrogation of the Constitution, a specific reference was made in the Proclamation to elections. It said that the same groups of people, which had brought Pakistan to the verge of ruination would rig the elections for their own ends, that the elections would be contested mainly on personal, regional and sectarian bases and that the elections would neither be free nor fair. The revolutionary Government, therefore, felt that elections held in such circumstances would have no real purpose.

In 1959 the Basic Democracies Order was promulgated, whereby a system of local administration was introduced. This was done with a view to bring about a sense of participation amongst the people in the governance of the State. Accordingly, 4,000 local councils were set up in each province with an average of ten elected members to a council. The local elections were completed in a very short time under the authority and supervision of local officers of the divisional and district and subdivisinal levels. The adult franchise rolls prepared in 1957-58 by the Election Commission(6) were modified and

6). Under the Pakistan Electoral Rolls Act, 1957, since repealed.

rearranged by the District authorities and used for the purpose of these elections. The electorate consisted of 3,37,63,886 adults. Out of these 2,05,75,461 cast their votes in 61,083 constituencies.(7).

Before the completion of elections, above referred to, the Presidential (Election and Constitution) Order, 1960 was promulgated, calling upon the elected members of the local Councils to declare, by vote, in a secret ballot to be held by the Commission, whether or not they had confidence in the President; 73,283 out of 78,720 members expressed their confidence in President Muhammed Ayub Khan. By virtue of the mandate given to him, the President appointed a Commission to make a new Constitution for Pakistan. It advocated restriction of the franchise to citizens who (a) had attained a standard of literacy, enabling them to read and understand the published matter giving information about the candidates and (b) possessed sufficient property or stake in the country, to ensure that they would be satisfied, as reasonable men, that they were electing proper representatives. The Commission did not favour indirect elections, but, to enable an early return to representative government, it recommended that the first election should be

7). Report on the General Elections in Pakistan, 1964-65, Vol. I, p. 3. A total number of 1,44,284 candidates contested these elections, 17,394 were returned unopposed.

indirect. At the same time it suggested that another Commission, called the Franchise Commission, should be appointed to examine more thoroughly the question of franchise.

The Franchise Commission submitted its report in 1963, i.e., after the promulgation of the 1962 Constitution, stating that the circumstances and conditions prevalent in the country were in favour of adult franchise; it upheld the principle of direct elections to the Assemblies and agreed that elections should be held indirectly as an interim measure.

The present Constitution provides for an electoral college (8), elected on the basis of adult franchise (9), each member of the College representing a specified territorial unit. The number of units, originally fixed at 40,000 in each Province, has been increased to 60,000 (10). The Electoral College, in turn, elects the President and members of the National and Provincial Assemblies (11).

Having seen the nature of franchise in Pakistan, it is ~~now~~ now proposed to examine the various qualifications and disqualifications of a voter under the Constitution.

8). ART.158 read with ART.155.

9). ART.157.

10) Vide S.3 of the Electoral College (Second Amendment) Act 17 of 1967.

11) Constitution of 1962, ARTS.165 and 168.

## Qualifications and Disqualifications of Voters

The qualifications and disqualifications contemplated under the Constitution of 1962 and the Electoral College Act, 1964 are as follows:-

### Qualification of Voters

#### Citizenship

The most important qualification for suffrage is citizenship. The well-known principle that the right to vote follows citizenship is also enunciated by the Pakistan Constitution. ARTICLE 157 reads:

"Except as provided by law any citizen

(a).....

(b).....

(c).....

shall be entitled to be enrolled on the electoral roll for that electoral unit."

(the undelining is by the author)

Citizens are persons recognised by law as members of the political community to which they belong. They are people who comprise the State and who, in their associated capacity, have established or subjected themselves to the dominion of a government for the promotion of their general welfare and for the protection of their individual as well as their collective rights. In Pakistan the statute dealing with the



subject is the Pakistan Citizenship Act, 1951, as amended, and the Rules made thereunder. The Act, though it does not provide a complete code of nationality law, follows the broad outlines of the British Nationality Act of 1948. It provides that every person becoming thereunder a citizen of Pakistan shall have the status of a Commonwealth citizen(12) and defines the term "alien" in such a manner as to exclude from the category any person who is a Commonwealth citizen in the sense of the British Nationality Act(13). The Act makes definitive categories of citizens by birth, descent, registration, naturalisation and incorporation of territory; it provides for the issue of certificates of citizenship in case of doubt; a transitorial category of citizenship by migration is also contemplated. These are briefly discussed hereafter.

Every person born in Pakistan is a citizen of Pakistan ~~in~~ under that Act. This, however, has no application when, at the time of a person's birth the father enjoyed the immunity from suit and legal process accorded to an envoy of an external sovereign power accredited ~~to~~ <sup>in</sup> Pakistan and was not a citizen

12). Pakistan Citizenship Act, S.15.

13). Ibid., S.2.

of Pakistan(14)It is also <sup>required</sup> ~~provided~~ that his father should not be an enemy alien and the birth in question should not have taken place in territory in occupation of an enemy(15).A

A more common type of citizenship is that by descent.A person whose father is a citizen of Pakistan at the time of his birth,is prima facie a citizen by descent.Where,however, the father is himself a citizen of Pakistan by descent only, and the person in question is born in a foreign country,the birth must be registered at the Pakistan Consulate or with other competent authority|and the person's father must not have at the time of his birth in the service of Pakistan(16).

Persons who migrated between the period 13th April,1951 (17) and 1st January,1952 from other parts of the Indo-Pakistan subcontinent to the territories now included in Pakistan are classed as citizens of Pakistan,provided they had the intention

15). IBid.,S.4(b).

16). Ibid.,S.5.

17). The date of the coming into force of the Pakistan Citizenship Act,1951.Persons who migrated before that date became citizens of Pakistan by operation of law(vide S.3,Pakistan Citizenship(Amendment)Act,1952,substituting the original proviso contemplating the discretionary admission to citizenship by grant of certificate to any claimant thereto ordinarily resident outside Pakistan who,or any of whose grand parents,was born within what is now Pakistan and who should not be a national or citizen of another country.

to stay in Pakistan permanently(18).The question of animus is one of fact and each case is decided on its merits.

Generally a person who moves from one place to another or one country to another has,at the time of moving an intention to remain in the country, to which he moved, only temporarily; but he may later form an intention of staying there permanently.It has been held that from that moment he must be deemed to have come to the country with the intention of staying there permanently(19).

The people who migrated from Pakistan to India before 1st March,1947 are not citizens of Pakistan(20).India takes the same view(21).But there is no bar to such persons returning to Pakistan under a permit for resettlement or permanent return and thereby becoming Pakistani citizens.Of course,

18). Pakistan Citizenship Act,1951,S.6.

19). Shanno Devi v.Hangal Sain,(1960)22E.L.R.469.

20). Pakistan Citizenship Act,1951,S.7;the effect of this provision is to cut down the operation of the transitional provisions with respect to migrants to India,contained in SS.3 and 6 and also of remaining provisions of S.3 and of the definitive rules ast to citizenship by birth laid down in S.4,in so far as concerns persons migrating from what is now Pakistan from India after the setting up of two dominions.

21). Constitution of India,Art.7.



Indian citizenship, if acquired, must be renounced before such an application can be entertained(22). S.8 makes provision for persons resident outside Pakistan at the date of the commencement of the Act. Any such person, whose father or paternal grandfather was born in the subcontinent, may at discretion obtain citizenship thereunder. But it is normally a prerequisite to his so doing that he shall obtain a certificate of domicile(23), which involves that he shall have established ordinary residence in Pakistan; no certificate will be required, if the person concerned is the holder of a Pakistani Passport or his father or paternal grandfather is resident in Pakistan at the commencement of the Act.

To acquire citizenship by naturalisation a person must apply to the Central Government; if a certificate of naturalisation is granted, it entitles the holder to all rights, privileges and capacities of a person born in Pakistan(24).

22). Pakistan Citizenship Rules, rr.11,19.

23). Under S.17 of the Pakistan Citizenship Act, 1951.

24). Naturalisation Act, 1926, S.7; it contemplates, inter alia, the discretionary naturalisation of persons of full age (eighteen years under the Pakistan Majority Act) satisfying a five-year residence or service condition and also condition as to character, linguistic knowledge and intention in relation to future residence or service.

The necessity of obtaining a certificate may be dispensed with in certain cases and it is within the discretion of the Government to grant or refuse a particular application(25).

Yet another method of becoming citizens of Pakistan is by incorporation of territory. If territory is ceded to Pakistan, the President may specify the persons and the conditions subject to which persons residing therein may be granted citizenship(26).

Thus, Pakistan citizenship can be acquired in a number of ways. The admission of aliens to citizenship is severely restricted, there being no general provisions for the same. Dual nationality or citizenship is not permitted(27) and a person may be deprived of his status as a citizen of Pakistan upon certain specified grounds(28).

In the United Kingdom, a voter must either be a British subject or a citizen of the Republic of Ireland(29). The law relating to Nationality is contained in the British Nationality

25). Pakistan Citizenship Act, 1951, S.9 and Pakistan Citizenship Rules, 1952, r.13(14). The latter provision requires reasons where exemption is sought from producing the certificate of naturalisation.

26). Pakistan Citizenship Act, 1951, S.13.

27). Ibid., S.14.

28). Ibid., S.16.

29). Representation of the People Act, 1949, S.1.

Act, 1948. Persons, who, under the citizenship law of each member of the Commonwealth, are citizens of that country also possess the status of British subjects and Commonwealth citizens (30). As pointed out by Prof. Mackenzie,

"The mother country is now in law an equal member of the Commonwealth, under the name of the United Kingdom and the colonies and it has its own special citizenship. This citizenship of the United Kingdom and the Colonies can be acquired easily by citizens of other Commonwealth countries, who come to live in Britain; but in spite of this, there is no rule that they must acquire the United Kingdom citizenship before voting at a United Kingdom election." (31)

Therefore, a Pakistani could vote in Britain, if he was present at the time of registration and has the general qualifications to vote. The Commonwealth Immigrants Act came into force on 18th April, 1962 and its object, inter alia, was to control immigration into the United Kingdom of Commonwealth citizens

30). The title "commonwealth citizenship" was chosen because the term "British subject" is inappropriate in relation to the Commonwealth countries. Commonwealth citizenship is not by itself a nationality but a title designating an individual as possessing the citizenship of some commonwealth countries which are independent States in international law.

31). Free Elections (1958), p. 20.

and to authorise their deportation from the United Kingdom in specified circumstances(32).Although the qualifications required of Commonwealth citizens applying for citizenship under the British Nationality Act are amended by the Act of 1962,it does not affect the right of the Commonwealth citizens to vote at elections in Britain(33).

### Residence

The residential qualification of a voter is equally important. It is necessary to promote internal stability and give the electoral authorities time to investigate qualifications. A voter has a responsibility to his fellow citizens as well as to the State to see that the most suitable representatives are sent to Parliament. If a member is to be a representative of his constituency, the voters must have local affiliations; they must belong to the electoral units or constituency in which they vote.

In Pakistan, there is no provision prescribing a minimum

32). Commonwealth Immigrants Act, S.12.

33). The position, after the passing of the Immigration Act of 1968, is also the same.

period of residence(34).The voter must either be a resident or be deemed to be one on the qualifying date(35).The expression "deemed to be a resident" is not defined in the Constitution,so it will be necessary to find out its meaning. But first,a few words may be said as to what "residence" means.Blackburn,J.,has construed it as under:-

"There is no strict or definite rule for ascertaining what is inhabitation or residence.The words have nearly the same meaning.....The question is whether there has been such a degree of inhabitation as to be in substance and common sense,a residence".  
(36)

One thing is certain,that for a particular residence to be effective,it must not be frivolous or colourable but bona fide.

Coming now to the meaning of the expression "deemed by law to be a resident",S.10 of the Electoral College Act lays down:-

".....a person will be deemed to be a ~~resident~~ resident of an electoral unit,if he resides or owns or is in possession of a dwelling house or other immovable property or works for gain in that unit".(37).

- 34). Paragraph 1 of Part I of the Second Schedule to the Basic Democracies Order,1959 had provided that a voter must be resident in the ward for a period of not less than six months immediately preceding the first day of January in which the preparation of the electoral roll commenced.
- 35). Constitution of Pakistan(1962),ART.157,Electoral College Act,SS.8,10 andS2(17) as amended by Act 17 of 1967.
- 36). Queen v.Mayor of Exeter,(1868)4 Q.B.D.110 at p.113.
- 37). Electoral College Act,S.10(1).



The effect of the above provision is that a person is a resident if he resides or owns or is in possession of a dwelling house or other immovable property or works for gain in that unit. The provision is provocative and foreshadows complications. A person can register in the unit where he lives or where he carries on his business or perhaps both (37a). The provision has been judicially interpreted by the West Pakistan High Court in Sardar Khan v. Regional Election Commissioner (38). The entry of the petitioner's name in the electoral roll was challenged on the ground that he did not qualify on the ground of residence, as defined in S.10(1). According to the Returning Officer, "being a mortgagee in possession of a house situate in the limit of the ward, he was a resident of the electoral unit"; he rejected the objection. On an application to review his order, the Regional Election Commissioner observed that, as the house in dispute was owned by another person and there cannot be two owners, as distinct from co-owners, of one property, a mortgagor does not lose his proprietary right, for it is not transferred to the mortgagee and the mortgagee merely collects and appropriates the rent. He held that the petitioner was not the owner, so he was neither a resident nor could be deemed one. He interpreted the word "possession" as meaning actual physical possession. He ordered the petitioner's name to be deleted from the said unit and registered in another unit.

37a). S.11 says that no person shall be entitled to be enrolled on the electoral roll for more than one electoral units. But it appears that the Legislature visualised a case of double enrolment.

38 ). P.L.D.1966 L.390.

The High Court held that the Regional Election Commissioner materially erred in the exercise of his jurisdiction by interpreting the provision in the manner stated above. It was further held that it is not necessary for being a "resident" that a person should both own a house and actually possess it; it is enough that he either owns or is in possession of a dwelling house or immovable property. S.A. Mahmood, J., said,

"....more than one person can be deemed to be resident by reason of a dwelling house or other immovable property, being situate in the electoral unit. A person owning it, a person in its possession, and a person <sup>who</sup> works for gain in that property, is each a resident and thus entitled to be enrolled on the electoral roll, if he possesses the qualification of age and is not otherwise disqualified to be on that roll. If an owner has mortgaged a dwelling house or other immovable property with possession, whether actual or constructive, he is equally entitled to be enrolled on the electoral roll as the owner of that property.... Even if a person is a mortgagee with possession and has rented out the property, he is in its possession and has to be deemed a resident, for purposes of subsection (1) of section 10, in the electoral unit where the property is situate." (38a)

A person owning or possessing dwelling houses or immovable property or who works for gain in more than one electoral units may make a declaration in writing to the Registration Officer, stating the electoral units on the electoral roll for which he intends to be enrolled(39). This applies where a person has more houses than one or works in two different electoral units and clause (2) is quite independent of clause (1) of S.10. The declaration has to be in form II (40).

A government servant, and a person holding public office, may either enrol himself in the electoral unit, of which he would have been a resident, if he had not been absent on public service(41). It will be seen that in this case the alternative is more manifest. The wife of such a person would normally be regarded as <sup>a resident of</sup> the electoral unit of which her husband is deemed to be a resident. But if she makes a request in writing to be deemed a resident of the electoral unit in which she owns property or occupies a dwelling house, an order to that effect will be made(42).

The Electoral College Act also makes provision concerning persons in the Armed Forces. A member thereof is to be deemed

39). Electoral College Act, S.10(2).

40). Electoral College Rules, Schedule I.

41). Electoral College Act, S.10(4).

42). Ibid., S.10(5).

a resident of the unit, indicated by him, of which he would have been a resident if he had not been a member of the  
(43)  
Armed Forces. In England, persons with service qualifications form a separate category of voters. Members of the armed forces and the servants of the Crown have to fill in a declaration (44) in which it must be stated inter alia that, but for circumstances entitling him to make the declaration, he would have been residing at the address specified in the United Kingdom. A wife can also avail herself of this provision; if she is residing with her husband, who has a service qualification (45).

For purposes of exercising the franchise, persons detained in prison, are considered to be residents of the electoral units, indicated by them, in which they would have been residents, if not detained. This is a clear example of the importance of local affiliation. In England and India, certain prisoners cannot vote; this is discussed below when dealing with disqualifications.

43). Ibid., S.10(3).

44). English Representation of the People Act, S.10(2).

45). Ibid. S.10(4).

Age

To be of full age is yet another pre-requisite for becoming a voter. In Pakistan, as in England and India, a person must be twenty-one years of age in order that his or her name may be entered on the electoral roll(46). The age is reckoned according to the qualifying date, which was the first day of May, 1964 for the preparation of the first electoral rolls under the Electoral College Act and, for amendments, corrections and revision of the electoral roll the qualifying date was the first day of January(47). For the next elections, the qualifying date <sup>is</sup> fixed as the ~~fixes~~ first day of October, 1968 and, in relation to the revision of an electoral roll, it means such date within the period within which the roll is required to be revised as may be prescribed(48). This is necessary because the mere fact that a vote is given by law to all otherwise qualified does not mean that every young person can vote at every election after his twenty-first birthday.

46). Constitution of Pakistan(1962), ART.157(a), Electoral College Act, S.8. England is proposing to lower the voting age. In 1965 the Labour Party's National Executive Council declared itself unanimously in favour of lowering the minimum voting age to 18. The Speaker's Conference on electoral law in Feb. 1968, however, recommended that it should be 20; it voted 24 to 1 for this and rejected by 22 to 3 a minimum age of 18. Recommendations of the Conference are not automatically adopted but its membership includes representatives of all three major parties and, according to the Times(London) of 28.2.68, the voting figure indicated that the proposal had substantial support from the Government and the Tories. *A Bill, seeking to lower the age to 18 years, has now been introduced in the Parliament.*

47). Electoral College Act, S.8 read with S.2(17).

48). Electoral College(Second Amendment) Act, 1967, S.2.



In India age is reckoned on the first day of the year in which the electoral roll is prepared or revised(49). In England, a person's age on the 10th of October determines whether a citizen is entitled to vote at any parliamentary election for which polling takes place within the twelve months beginning on the 16th of February in the following year(50). However, a person who is not of full age on the qualifying date but is so on the 15th June next following the publication of the register, is entitled to be placed on the register and allowed to vote at any election after the second day of October(51).

The birthday of a particular person may sometimes be a matter for argument, as the law does not take into account a fraction of a day. In re Shurrey(52), Sergeant, J., had to deal with a will, under which certain persons would receive shares in the residue of the testator's estate on their attaining the age of twenty-five. One of the legatees was born on 22nd July, 1891 and died on 21st July, 1916, that is on the day immediately preceding his twenty-fifth birthday. The question was whether he had reached the stipulated age

49). Representation of the People Act, 1950, SS. 19(a) and 14(b).

50). Electoral Registers Act, 1949, S. 14 and Electoral Registers Act, 1953, S. 1(1).

51). Electoral Registers Act, 1949, S. 2.

52). (1918) 1 Ch. 263.

and thereby taken a vested interest in a third of the testator's residue. It was held that he had. In Md. Nazir v. Said Md. (53), a case under the Basic Democracies Order, 1959, which required that a candidate must be twenty-five years of age on the first day of January preceding the election, the respondent was born on the night following the 31st December, 1934 and would be twenty-five years of age on 1st January, 1960; he was below twenty-five years of age on the nomination day, viz. 3.12.59 and also when the polling took place between the 26th and 29th December. It was argued that he should be deemed to have attained the required age on the first day of January, 1959. But the Court, on the ground that the date had to be reckoned from the nomination day, held that he was disqualified.

The general method of proof of age is the production of a birth certificate. In the absence of proof to the contrary, entries in it, have been accepted by courts as conclusive on the point or at least <sup>deemed</sup> of high value (54). A difficulty, however, arises in places where the registration of births is imperfect. It is possible that the entry in the register of births may not contain the name of the infant,

53). P.L.D. 1962 L. 421.

54). Sankra, N. v. Yoshoda, (1957) 13 E.L.R. 30; Nanak Lal v. Baij Nath, A.I.R. 1935 Pat. 474. In a recent case of Md. Yusuf v. Karam Dad, P.L.D. 1968 L. 30 it was brought to the notice of the High Court that the Controlling Authority, while setting aside the election of the petitioner, on the ground that he was disqualified by reason of age, had relied, inter alia, on the birth entry. The Court did not comment on this.

~~but~~ only the name of the father is mentioned and this is the same as that of the father of the voter in question. It could be argued that the entry relates to another person, such as a brother. So it is necessary to refer to other documents, such as the school register, the school leaving certificate, the record of appointment in Government service, for usually these entries refer to incidents to which age limits attach. But a school leaving certificate is not regarded in Pakistan as very reliable(55). The reason was stated by Kayani, C.J., in the following words:-

"It is now widely known that parents give a younger age to school boys than they actually possess in order that it should keep them in Government service."(56)

In an earlier Lahore case, Addison and Agha Haider, JJ., had also observed:-

"It is very common to make out a person entering into a school to be younger in age than he is, in order not to be too old for Government employment, when his education is completed and for other reasons."(57)

The view in India is that, though entries in the admission

55). Abdur Rashid v. Mahmood Sasiq, F.L.D.1966 L.216.

56). Md. Nawaz v. The Collector, F.L.D.1960 L.1123 at p.1130.

57). Md. Hasan v. Safdar, A.I.R.1933 L.601 at p.603.



registers are relevant, as entries made by public servants in the discharge of their official duties(58), they are not of much evidentiary value and reliance cannot be placed on them (59). They can be rebutted by medical and oral evidence(60) or even by an entry in a birth register(61).

If the entries in <sup>the</sup> birth register or the school register are relied upon, it is essential that there should be evidence to connect them with the person whose name is entered on the electoral roll; this has been held by Iqbal, J., in Ghulam Qadir v. Ahmed Shafi (62).

It must also be mentioned that, if the document is admitted by the other party, he cannot be allowed to contend that it was inadmissible under the Evidence Act <sup>(63)</sup>. When a person makes an admission of his age to his disadvantage, it may be subsequently used as evidence to his disadvantage, when he claims a vote.

58). Sankra, N. v. Yashoda, (1957) 13 E.L.R. 34; Kala Ram, B v. Fazal Bari, A.I.R. 1941 Pesh. 38.

59). Rajab v. Jyotish, A.I.R. 1941 Cal 41; Jagan Nath v. Moti Ram, A.I.R. 1951 Panj. 377; Sankra, N. v. Yashoda, (1957) 13 E.L.R. 34.

60). Golghat Case, 1 D.E.C. 405.

61). Id. Hasan v. Safdar, A.I.R. 1933 L. 601,

62) P.L.D. 1966 L. 68.

63). Abdur Rashid v. Mahmood Sadiq, P.L.D. 1966 L. 216.

Sex

There is no discrimination on grounds of sex in the qualifications<sup>for</sup> exercising the franchise in Pakistan. Every woman, whose age is not less than twenty-one and who is otherwise qualified, is eligible to vote(64). The history of the suffragette movement shows that, while in some countries women enjoyed equal rights with men in this matter, being both eligible to contest elections and having the right to vote, in others they had the right to vote without being eligible for election or were eligible without having the right to vote. The reasons <sup>given</sup> ~~varied~~ varied from lack of judgement and independence to the fear that they might form an independent parliament.

In England, women were, under the Common Law, incompetent to vote(65), and even the Representation of the People Act of 1867 emphasised this incompetency(66). But efforts to win the franchise continued in the 19th century; it was in 1905 that the movement really gained force under Mrs. Pankhurst, the founder of the Women's Social and Political Union. The law giving women votes was finally passed in 1918 ~~and~~ 1928.

64). Constitution of Pakistan(1962), ART.157.

65). 4 Inst.5.

66). Charlton v.Lings,(1868)4L.R.C.P.374.

In America the equal rights movement may be said to begin with a local convention held at Seneca Falls, New York in 1848. There the women formulated a "declaration of sentiments", stating their grievances against men, the just ground of their rebellion. Inter alia, it recited, "He (man) has <sup>not</sup> permitted her to ~~exer~~ exercise her inalienable right to the elective franchise" and "having deprived her of this right of a citizen, the elective franchise, thereby leaving her without representation in the halls of legislation, he has oppressed her on all sides" and further, "now, in view of this entire disenfranchisement of one half of the people of the country, their social and religious degradation—in view of the unjust laws above mentioned and because women do feel themselves aggrieved, oppressed and fraudulently deprived of their most sacred rights, we insist that they have admission to all the rights and privileges which belong to them as citizens of the United States" (67). During the period 1870-1910 women organised themselves into groups <sup>(68)</sup> and made some headway. They won the school suffrage in more than twenty states; the municipal suffrage in Kansas (1887); for property owners the right on some or all measures

67). Edward McChenney Bait, American Parties and Elections (1927) p.60, text quoted in History of Women Suffrage by Santon and others.

68). The National Women Suffrage Association and American Women Suffrage Society founded in 1869. They coalesced in 1890 under the name of American Women Suffrage Association.

*The National*

submitted to tax-payers in six states;and,far more important, full suffrage in Wycoming(1890) and in three neighbouring states of Colorado(1893),Idaho(1896)and Utah(1896) (69). The progress that had been made before 1910 was more than offset by repeated disappointments.Seventeen times,in eleven states,the question of women's suffrage was submitted to voters and rejected fifteen times.In 1910,however,Washington was won;victory in California followed owing to money and literature provided by the National American Woman Suffrage Association.Arizona,Kansas and Orgeon followed in 1912,Montana and Nevada in 1914.The Illinois legislature gave women the right to vote for presidential electors in 1913.These successes, though confined to the West,pointed to the ultimate conquest of the whole country.In 1917 the suffragettes won New York. The victory was decisive;in January 1918 the House of Representatives passed the women suffrage amendment by the necessary two-thirds.The Nineteenth Ammendment,passed on June 4,1919 provided,"the right of citizens of the United States to vote shall not be abridged by the United States or by any state on account of sex".

69). The states enumerated had less than two per cent of the population of the country.They cast about three per cent of the electoral votes.

The grounds for refusing suffrage to women in Islamic countries were that women were <sup>more</sup> likely than men to act on their emotions than on reason; their judgement was unstable; they would have to attend public meetings, speak in public and engage themselves in frequent travel, which would be unseemly and undignified. Their right to participate in political processes is inconsistent with Islamic principles(70).

The 1933 Rules for Local Bodies Elections in Indo-Pakistan refused women the right to vote. It was considered that rural women were less educated and more illiterate than men; they lacked independence of judgement in exercising the right to vote, so that a woman's vote would mean a second vote for a husband, father, brother or son; they have little knowledge of the functions of local bodies and social customs prohibit them from mixing with men and being canvassed by them. But these factors are irrelevant to the current situation in Pakistan. The Constitution of Pakistan declares it an inalienable right of every "citizen" to vote at any election in Pakistan(71). In fact, it even goes further to create special seats in the Assemblies, reserved exclusively for women(72). The latter point has been dealt with under the chapter on

70). *Atta Ilahi v. Sohra Parveen*, P.L.D.1958 S.C.298 at pp.309, 310.

71). ART.157.

72). Constitution of Pakistan(1962), ART.162.

delimitation of constituencies(73).The neighbouring country of India also holds elections to the House of the People and the Legislative Assemblies on the basis of adult suffrage(74).

### Sound Mind

Only a person of sound mind can be entered on the electoral roll and entitled to vote(75).In other words }no person non compos mentis,that is a person of unsound mind, is competent to vote at an election.Such persons may be divided into four categories:

- (1)idiots,i.e. persons of unsound mind since birth;
- (2)persons who from sickness,grief or other accident have wholly lost their memory and understanding;
- (3)lunatics,who though sometimes of unsound mind,enjoy lucid intervals(aliquando gaudet lucid intervalis)and
- (4)persons who by their own vicious acts for a time deprive themselves of memory and understanding,for instance persons suffering from delirium tremens (75).

It will be seen that whereas persons in the first and second categories are permanently disqualified,those in the third

73). Namely,Chapter 2.See also Chapter 5 on the Elections.

74). Constitution of India,Article 326.Celebrating the jubilee of votes for women in Feb.1968,the leader of the opposition announced that he had set up a research committee to examine the law as it relates to women(The Times(London),20th February,1968.

75).Constitution of Pakistan(1962),ART.157 and Electoral College Act,7.8(1)(b).

76). Taylor's Medical Jurisprudence(2nd ed.)p.478.

and fourth category may vote as long as they are in their senses. This, however, will always be a question of fact and, before a ballot paper is handed to him, a Presiding Officer must satisfy himself that, at the moment of voting, the person concerned is sufficiently compos mentis to discriminate between the candidates and to answer the statutory questions in an intelligent manner. It follows therefore that a person of unsound mind may vote during lucid intervals. (The method of proving a person non compos mentis, is similar to that of proving him an idiot(77)).

#### Disqualifications of Voters

It has been recently held by the High Court of West Pakistan(78) that there is a distinction between a person not qualified and a disqualified person and so long as one is not qualified no question of disqualification arises. This statement is necessary because neither the Pakistan Constitution nor the electoral laws have prescribed disqualifications of a voter. It might, however, be interesting to refer to a few of the general disqualifications recognised in the English and the Indian law, if for no other reason than to show that the position is, in some respects, materially different <sup>in</sup> /Pakistan. 77). Blackstone's Commentaries, Vol. 1 (1893 ed.) p. 227. 78). in Md. Tufail v. Md. Salim, P.L.D. 1967 K. 104.

In England, a person convicted of treason or felony and sentenced to death, preventive detention or corrective training or to a term of imprisonment exceeding twelve months cannot vote, unless the punishment or a substituted punishment has been undergone or a free pardon is obtained(79). A person convicted only of a misdemeanour may, however, vote as long as his punishment does not prevent him from doing so(80). According to Schofield, a number of persons convicted ~~for~~ of misdemeanours were allowed to vote by post in the 1950 election (81). In India, on the other hand, a person, who is confined in a prison, whether under a sentence of imprisonment or otherwise, or who is in lawful custody of the police, cannot vote at an election(82). It appears that a person subjected to preventive detention may vote(83). It may be mentioned that the Government of India Act, 1935 had provided that no person should vote at an election in any territorial constituency, if he was for the time being undergoing a sentence for transportation, penal

- 79). Forfeiture Act, 1870, S.2; Constitutional Law by Wade and Brodley(1965), p.106.
- 80). Halsbury's Laws of England(3rd.Ed.)Vol.14, p.13; re Jones (1835)2 Ad.E.R.436.
- 81). Parliamentary Elections(1955)p.21.
- 82). Representation of the People Act, 1951, S.62(5).
- 83). Ibid., S.62(5) proviso.



sevitute or imprisonment(84).The position in Pakistan is materially different.Conviction,followed by a sentence of imprisonment,does not affect the right of a person to vote at an election(though it may disqualify a person to become a candidate to the Electoral College and an Assembly in certain cases(85)). It has already been observed that the Electoral College Act makes elaborate provision for the registration of persons detained in prison or other legal custody(86).

For corrupt and illegal practices and other election offences,a punishment of imprisonment or fine or both is prescribed(87).There is no provision in the Pakistan law, whereby persons guilty of the commission of such offences may be deprived of their right to vote,although such persons may be disqualified from being or being elected as members of the Electoral College or an Assembly(88).A disqualification to vote is incurred in India(89).In England,a person convicted on indictment of a corrupt or illegal practice suffers temporary disqualification,which is universal in its incidence in the case of a corrupt practice(90).

84). Sixth Schedule,S.7.

85). Electoral College Act,S.53(1)(e) and (h) as amended by S.9 of the Electoral College(Second Amendment)Act,1967; Contition of 1962,ART.103(2)(c).Discussed in Chapter 4,

86). While discussing the qualification on the ground of residence

87). Electoral College Act,SS.61,62;National and Provincial Assemblies(Elections)Act,SS.80,81;Penal Code,ch.IX A.

88). Electoral College Act,S.53(1)(i);Assemblies(Elections) Act,S.104.

89). Representation of the People Act,1951,S.141.

90). Representaion of the People Act,1949,S.140.

The Electoral Roll  
General

A person, even possessing the qualifications discussed above, may not vote unless his name is also borne on the electoral roll. An electoral roll or electoral register (as it is called in England) is a list of persons entitled to vote at the election to which it relates. This provision is necessary because-

(i) adjudication on the qualifications of individual voters should be kept separate from the process of voting and should as far as possible be disposed of in advance;

(ii) a voter has not a general right to vote ~~xxxxx~~ but a right to vote in a particular constituency; the electoral roll is definitive evidence of the right to vote in the particular constituency;

(iii) the electoral roll is the basis of the organisation of the electoral campaign between the parties.

In Pakistan, a separate electoral roll is to be prepared and maintained for each electoral unit(91), in such language as the Chief Election Commissioner may direct(92). For each electoral roll a Registration Officer is appointed and he is responsible for preparing the roll for that unit. Assistant Registration Officers may be appointed to assist in the

91). Constitution of Pakistan(1962), ART.156.

92). Electoral College Rules, R.5.

performance of his duties(93). Subject to instruction issued by the Chief Election Commissioner, an Assistant Registration Officer may perform the functions of the Registration Officer and the latter officer may require any person ~~wh~~ to assist him in the performance of his functions(94). Thw work is required to be done under the supervision of the Chief Election Commissioner but he has delegated his power in this respect to the Provincial Election Authority(95). ~~The fix~~

The first step is the collection of data on which a draft electoral roll may be prepared. The Registration Officer may have access to the register of births and deaths and collect information and take ~~ex~~tracts from any register. The person in charge of such registers cannot withhold the information demanded(96).

93). Electoral College Act, S.7(1).

94). Ibid., S.7(2) as amended by S.6 of the Electoral College (Second Amendment) Act 17 of 1967. By virtue of this amendment it became necessary to amend the definition of a Registration Officer given in S.2(18); it now includes an Assistant Registration Officer (vide S.2 of the Amending Act).

95). Notification No.F.2(5)/64-ELS dated 28th April, 1964.

96). Electoral College Act, S.9. Regulation 22 of the English Representation of the People Regulations, 1950 provides likewise but under reg. 70, a person who refused to give the information is liable to punishment.

### Preparation of Electoral Rolls

The preparation of electoral rolls is a very important step in the process of elections. Unless electoral rolls are prepared accurately, they will fail to ensure the return of true representatives to the Legislatures.

A door to door enquiry is contemplated but, in practice, however, recourse is usually had to the previous electoral rolls at the time of the preparation of the draft electoral rolls. Very often agents of the prospective candidates procure a copy of the same and, accompanied by assistants from the office of the Provincial Election Authority, make hurried enquiries. This, it is submitted, is a practice to be deprecated for (a) it results in the exclusion of eligible voters and inclusion of invalid and "bogus" voters and (b) it produces mistakes in the roll, particularly with regard to entries regarding age. If proper enquiries were made at this initial stage, plenty of unnecessary trouble could be avoided. Frankly, very few persons are sufficiently interested to register themselves; few genuinely care what entries are being ~~recorded~~ recorded; it is generally an interested party, who brings forward claims and objections. It is submitted that the Government should give wide publicity to the fact that the electoral roll will be prepared in the press and elsewhere. The people should be encouraged to claim the right to have their names put on the roll and to see that the

that the particulars regarding them are correctly registered. the old electoral<sup>roll</sup> should only be regarded as a basis on which to start but registration authorities should be held responsible for ensuring the correctness of the roll, irrespective of any assistance received from candidates for elections.

A principle to be kept in mind during the preparation of the electoral roll is that double enrolment must be prevented. No person should be enrolled more than once on the electoral roll for ~~any~~ a particular electoral unit or in the electoral rolls of more electoral units than one. S.11 of the Electoral College Act provides:-

"No person shall be entitled to be enrolled  
(a) on the electoral roll for any electoral unit more than once; or  
(b) on the electoral rolls for more than one electoral units:

Provided that, if he is so enrolled, he shall not cast his vote from more than one electoral unit."

(the underlining is by the author)

It is interesting to note that the prohibition is not absolute and that the Legislature does visualise a person being enrolled in more than one electoral unit. All that the section contemplates is that a person enrolled more than once shall not vote more than once or in more than one unit; this has

received judicial recognition from the West Pakistan High Court in Munir Ahmed v. Returning Officer(97). It may be added that the proviso is not happily worded for it is an exception to clause(b) only. The Legislature has apparently omitted to provide for the case where a person is enrolled twice on the same roll. It is submitted that the provision would be clarified by the omission of the proviso,

### Claims and Objections regarding Draft Electoral Roll

After the draft electoral roll has been prepared, the Registration Officer must publish it together with a notice inviting claims and objections(98). It is important that these should be lodged or filed within seven days of the publication of the draft electoral roll(99) for an objection not taken within ~~the~~ time must be rejected(1).

Only a person whose name appears on the electoral roll may object to the inclusion of any person, enrolled as a voter in the same roll, by applying to the Registration Officer for exclusion of the said name(2). An objector whose name appears on the elector's list has been held entitled to object, even

97). P.L.D.1966 K.1.

98). Electoral College Act, S.8(2); Electoral College Rules, r.8.

99). Electoral College Rules, r.11.

1). Ibid; ,r.15 and Ahsan Ali v. Z.A. Chaudhury, P.L.D.1966 D.41.

2). Electoral College Rules, r.13(1).

though his name was subsequently struck off on objection(3). If the application is in writing, it should be signed and certified in token of its correctness(4). It is within the discretion of the Registration Officer to hear a person, who desires to be heard in connection with the objection and he may make such other enquiries as he deems necessary. If the Registration Officer is not satisfied with the proof adduced, the objection will be rejected and his decision becomes final(5). Where, however, the objection appears to be prima facie justified, the law makes it incumbent on him to publish the objection and also to serve a notice on all persons likely to be affected thereby(6). If the respondent fails to appear in spite of service, the Registration Officer must proceed to hear the objection(7). In other words, an ex parte enquiry is contemplated; otherwise a summary enquiry ~~will~~ be ~~was~~ held. The Registration Officer must, as a matter of principle, not consider any objection, of which the voter has no previous notice. So, Collieridge, C.J., in

3). Pease v. Middlesborough Town Clerk, (1893) 1 Q.B. 127.

4). Electoral College Rules, r. 13(3).

5). Ibid., subrule(5).

6). Ibid., subrule(6).

7). Ibid., subrule(7).

Smith v. Woolston(8),held,

"I am strongly of the opinion that it is not the duty of the revising barrister, if one objection is pointed out by notice to another, to allow another objection to be taken before him; because the voter may have prepared to meet one objection and then be surprised by another for which he is not prepared."

The decision of the Registration Officer, rejecting an objection has not been made appealable(9). The reason is that to allow an appeal therefrom would result in multiplicity of proceedings, which is not in keeping with the spirit of the Electoral College Act and Rules, which provide for a summary enquiry in the disposal of appeals and election petitions(10). Litigation is common in the subcontinent and, if appeals and revisions were permitted, the election might be held up indefinitely. On the other hand, it is only meet and proper that a person, whose name has been expunged from the roll, should be allowed to appeal against the deprivation of his valuable right to vote, if he can show

8). 40 L.T.198 at p.199.

9). Electoral College Rules, r.13(5) read with r.14.

10). As to whether an election tribunal can dispose of a petition summarily, see Chapter 8 on Election Disputes.



that he has a case which deserves consideration. In England, an appeal lies from any decision of the Registration Officer but a person, who has not availed <sup>himself</sup> of the prescribed right to be heard or make representation to the Registration Officer on the matter, which is the subject of appeal, cannot do so(11).

A person claiming to be a voter can apply to be enrolled by adducing documentary and oral evidence. Where necessary, the Registration Officer will hold a further enquiry and hear any person to determine whether the claimant should or should not be entered on the electoral roll(12). An appeal lies only against a rejection of the claim, so the decision with regard to the acceptance of a claim is final(13). It is submitted that such an arrangement is satisfactory to the candidate whom the enrolled voter supports but his rival and his supporters have no remedy, if the enrolled voter is not qualified.

Appeals against the orders of the Registration Officer, rejecting a claim or accepting an objection, are heard by the revising authority, appointed by the Chief Election Commissioner for a group of electoral units. Assistant revising authorities

- 11). Representation of the People Act, 1949, S.45(1).
- 12). Electoral College Rules, r.12. the nature of the enquiry is summary, For subrule(5) says that neither the claimant nor any person, who has been allowed to be heard, can ask for adjournment of the proceeding.
- 13). Electoral College Rules, r.14(1). The reasons stated above in connection with the rejection of an objection would a fortiori, apply here.

may be appointed with the same powers but subject to the control of the revising authority(14).

Any person aggrieved with the Registration Officer's order rejecting a claim or accepting any objection, can, on payment of Rs.10, obtain from the Registration Officer a copy of his order and a statement of gist of the case(15). If more than one application arises out of the same case, the Registration Officer may send the copy and statement to the revising authority and direct the applicant to appear before it on a fixed date(16). The sending of the copy of the order with the gist of the case to the revising authority, instead of giving it to the applicant, appears to be a strange practice, for the person aggrieved would like to study the copy of the Registration Officer's order to search for possible points of attack in appeal. The reason for the provision ~~apparently~~ is presumably administrative convenience but, in any case, such an order should be open to inspection by the <sup>party</sup> aggrieved(17). The applicant must file the appeal within three days of the receipt of the copy by him

14). Electoral College Rules, r.9 read with r.14.

15). Ibid., r.14(2).

16). Ibid., proviso.

17). Electoral College Act, s.81 read with Electoral College Rules, r.16.

or when it is received in the office of the revising authority(18).The revising authority may call for the record and make such enquiries as he deems fit and his decision is not open to question(19).

'Suo Motu' Powers to Include or Exclude Names

The Registration Officer has himself, within seven days of the publication of the draft electoral roll, request the revising authority to include, exclude or correct names therein(20).Rule 16 of the Electoral College Rules reads thus:-

"The Registration Officer may, within a period specified in rule 11, request the revising authority-

(a) to include in the electoral roll the name of any person left out due to inadvertance or the absence of timely information while preparing the draft electoral roll; or

(b) to exclude any name from the electoral roll or make correction of clerical errors which he is himself authorised to make under subsection(3) of S.8."

(the underlining is by the author)

It may be noted that the rule has reference to the stage before the publication of the final electoral roll, so does S.8(3), under which the Registration Officer is to make

18). Electoral College Rules, r.14(3).

19). Ibid., r.14(4).

20). Ibid., r.16.

such additions or modifications as may be required by any decision on any claim or objection and correct<sup>any</sup> clerical or printing error. Now subsection(3) of S.8 is clearly intended to cover the decisions of the Registration Officer as well as the revising authority. Reading S.8(3) and r.16(b) together, it would seem that the revising authority, besides hearing<sup>an</sup> appeal, is invested with the powers of reference in cases where the Registration Officer decides to invoke r.16. But we have already seen that finality is attached to the orders of the Registration Officer (a) accepting a claim and (b) rejecting any objection. Does a further reference lie to the revising authority in such cases? It is submitted that the answer should be in the negative. The provision under discussion would also seem to become redundant since the amendment of S.8(5) and addition of subrule 2A to r.22, whereby the Registration Officer has been given further powers in the matter of correction of entries in the electoral roll(21). This is discussed below. It should be pointed out, that, though the first part of clause(b) of r.16 speaks of exclusion of any ~~person~~ name from the electoral roll, the grounds on which it may be done are not stated. Again, clause(b), as it now stands, is not happily constructed. The latter part dealing with corrections ought to form a separate subsection.

21). Electoral College(Second Amendment) Act 17 of 1967 and Electoral College Rules, 1964(Amendment) dated 17.10.67.

The list, published after the necessary additions, modifications and corrections have been made by the Registration Officer, becomes the final electoral roll for purposes of ARTICLE 156 of the Constitution(22). We will proceed to consider the proceedings subsequent to this.

#### Amendment of the Electoral Roll

After the publication of the final electoral roll, amendments by addition of names and correction of entries may still be carried out for the following purposes:-

- (a) to correct any entry or supply any omission therein,
- (b) to include the name of any qualified person whose name does not appear or of any person who has, since its establishment or its last revision, become qualified to be enrolled on such electoral roll, and
- (c) to delete therefrom the name of any person who has died or has become disqualified ~~from~~ for enrolment on such roll.(23)

A person who claims to have become entitled to be enrolled must apply to the Registration Officer of his electoral unit. Rule 22(1), as originally enacted, provided that the application should be accompanied by a fee of Rs.5. This

22) Electoral College Act, S.8(5) as substituted by S.4(b) of the Electoral College (Second Amendment) Act, 1967.

23) Electoral College Act, S.8(4) as amended by S.4 of the Electoral College (Second Amendment) Act, 1967 read with r.21 of the Electoral College Rules, and r.22.

raised the questions whether the levy of Rs.5 was legal <sup>and</sup> whether the law under which it was imposed was intra vires the Constitution. The former Law Minister of West Pakistan in his article in the Pakistan Times(24) examined the various provisions of the Constitution and the law on the subject and concluded that r.22(1), in so far as it imposed a levy in respect of amendment, <sup>it</sup> had the effect of arbitrarily clogging or limiting a constitutional right; it ~~was~~ was opposed to the concept of adult franchise; it was illegal and ultra vires the Constitution and the Act. In October 1967, subrule(1) of r.22 was amended and the words "on payment of Rs.5 in court fees stamps" <sup>were</sup> ~~deleted~~. After issue of notice, a short enquiry will be held and, if the Registration Officer is satisfied, he will amend the electoral roll so as to include the name of the applicant(25).

Similarly, a person may apply for the correction of an existing entry relating to himself. The Registration Officer must ~~be~~ satisfy himself that the entry relates to the applicant and that the entry is erroneous or defective. But where the entry relates to a person other than the applicant, a notice should be sent to the person likely to be affected

24). Ghulam Nabi Memon, Enrolment as voter: Is the Fee Legal? Cutting received in September, 1967 from home; the date of publication not known.

25). Electoral College Rules, r.22(1).

thereby and amendment will only be made on proof that the entry in question is either defective or erroneous or ought to be deleted(26).By virtue of new subrrule(2A),the Registration Officer has been empowered to correct errors on the electoral roll.The scope of the subrule is only limited by subrule(3);otherwise this provision can be invoked by the Registration Officer at any time.It reads:-

"Where at any time,an error in an entry in an electoral roll for the time being in force,comes to the notice of the Registration Officer,he may of his own accord motion and after giving notice to the person to whom the entry relates,correct such error."(27).

It is difficult to conceive that this subrule gives the Registration Officer a further power to amend,for his jurisdiction is confined to making small corrections. Subrule(2A) is comparable to subrule(2) but differs from subrule(1),dealing with questions of substance,*affecting the* inclusion of a person's name on the electoral roll.So it is not inconsistent with the provisions(already discussed) which attempt at giving finality to the orders of the Registration Officer and the revising authority.

26). Ibid.,r.22(2).

27). subrule (2) of r.22 introduced by the Electoral College Rules Amendment notification of 17.10.67.

But the provisions of subrule(1) and (2),discussed above,are controlled by subsection(3),which reads:-

"No application under subrule(1)or subrule(2) shall be entertained nor shall any amendment or correction of any electoral roll be made under this rule,at any time,after the electoral unit to which the application,amendment or correction relates has been called upon to elect its representative.

Provided that no such election shall be postponed on the ground that such application, amendment or correction is pending on the day the electoral unit is called upon to elect its representative."(28)

This subrule embodies the principle of finality attaching to electoral rolls,so that an election is held in time and disputes as to entries in the electoral roll do not delay the holding of the elections.There is a specific proviso framed to ensure that no election should be postponed on the ground that an such application is pending disposal on the day the electoral unit is called upon to elect its

- 28). As amended by the Electoral College Rules(Amendment) dated 17.10.67.By the amendment,the provision applies to an application under subrule (1) and (2) and any amendment or correction.The subrule,as originally enacted,contained the words,"application under subrule (1)" and "no amendment under subrule(2)".The change was necessitated owing to the new subrule(2A),which empowered the Registration Officers to make "corrections".



representative. It has been held that subrule(3) is absolute in its terms and no amendment or correction should be made which contravenes its provisions. In Munir Ahmed v. Returning Officer(29), the notification calling upon the electors to elect their representative was issued on 3rd. October, 1964 and 15th October was fixed for receipt of nominations; no amendments were filed on that day, so the Returning Officer issued a fresh notice announcing 21st November as the date for filing the nomination papers. The Registration Officer, on the order of the deputy Chief Election Commissioner, added the name of the third respondent on 16th October, and the name of the petitioner and his supporters on 26th October, in pursuance of their applications. There was admittedly no new notification superseding that of 3rd. October. The High Court of West Pakistan held that, after the notification had been issued on 3rd. October, no additions or amendments could be made in the final electoral roll before the conclusion of the election and the Registration Officer acted in clear violation of the provision contained in sub-rule(3) of r.22 in adding the name of the petitioner, his two respondents and respondent No. 3. A similar view was taken in Ghulam Qadir v. Election Tribunal(30). Upholding the

29). P.L.D.1966 K.1.

30). P.L.D.1968 Q.1.

decision of the Election Tribunal, it was held that the application, which should have been made within the stipulated period, had not been made and the electoral roll bearing the name of the petitioner was in contravention of the law. In Md. Yusuf v. Karam Dad (31), the fourth respondent was elected as a member of the Electoral College. When he contested for the <sup>office of</sup> Chairman, under the Basic Democracies (Election of Chairman) Rules, the petitioner contended that as the respondent was shown as twenty-four years on the final electoral roll, he ~~was disqualified~~ did not qualify for election. The respondent replied that he had made an application to the Registration Officer, who by his order dated 7th October, 1964 corrected the entry. The Controlling Authority, relying on Ahsan Ali v. Z.A. Chaudhry (32) which decision was erroneous and had been overruled, dismissed the objection on the ground that he was not competent to go behind the entries in the electoral roll. Before the High Court, the petitioner argued that, even if the correction was ordered by the Registration Officer, it was in violation of r.22(3) of the Electoral College Rules, because the notification calling upon the electors to elect their representative had been issued on 3.10.64 and the

31). P.L.D.1968 L.30.

32). P.L.D.1966 D.41.

Registration Officer was powerless to make amendments or corrections until after 2.11.64, i.e. the date of the election. S.A. Mahmood, J., held that, "there is no manner of doubt that the correction of respondent's age was made in contravention of subrule(3) of rule 22". The Supreme Court has also taken the same view in Rashid Ahmed v. Barkat Ali (33).

With respect to amendments necessitated by the occurrence of deaths, the Registration Officer may issue a general or special order, requiring any person in charge of the register of births and deaths or a local or other authority to inform him of the death of a person above the age of twenty-one, as and when that death occurs or is brought to the notice of the Registration Officer, he must delete the name of the deceased from the electoral roll (34).

The Electoral College Act was amended ~~xx~~ (35), so as to introduce S.13-A with effect from 14th October, 1964. This new

- 33). P.L.D.1968 S.C.301. It was held that the name of the respondent was included in the electoral roll "not in accordance with the law but in clear disregard of the mandatory provisions of subrule(3) of rule 22".
- 34). Electoral College Rules, r.22(5). The provisions are similar to those contained in reg.14 of the Representation of the People Regulations of 1950 in England.
- 35). By the Electoral College (Amendment) Ordinance 8 of 1964. It authorised the Chief Election Commissioner to include the name of any elector at any time, "whether before or after the publication of the final electoral roll under subsection(4) of S.8. By s.7 of the Electoral College (Amendment) Act 2 of 1967, the word in inverted commas were deleted.



section empowered the Chief Election Commissioner to include in the electoral roll the name of any person qualified to be enrolled. The Commissioner may exercise the wide power at any time and it provides another opportunity for a person wrongly disenfranchised to be placed in the electoral roll. It is necessary that the matter be brought to the notice of the Registration Officer.

#### Revision of the Electoral Roll

Every electoral roll was <sup>initially</sup> required to be revised annually; the period has been extended to eighteen months(36). The new S.12(1) reads:-

"Every electoral roll shall for the purpose of its maintenance up to date, be revised with reference to the qualifying date, in the prescribed manner within the ~~period~~ of eighteen months immediately preceding the day on which the term of the Electoral College is due to expire so as to complete such revision ~~within~~ at least six months before such day."

Under subsection(2), however, the Chief Election Commissioner may call for the revision as and when necessary. A large discretion is vested in him, for he may have the revision carried out at any time which, it is submitted, is prima facie

36). Electoral College Act, S.12(1) as reenacted by the Electoral College (Amendment) Act 2 of 1967 and further amended by S.8 of the Electoral College (Second Amendment) Act 17 of 1967.

ultra vires the provisions contained in Chapter IV of the Electoral College Act. However, the law requires the procedure prescribed for the preparation of a draft electoral roll to be followed(37). Failure to carry out the revision does not affect the validity or continued operation of an electoral roll prepared or revised earlier(38).

### Finality and Conclusiveness of Electoral Roll

The various provisions of the Electoral College Act and the Rules made thereunder, which have been considered, show that the Legislature has made sufficient provisions for inclusion and raising objections to the inclusion of a person in the electoral roll at various stages. The policy of the law is that all questions as to the right to vote must be raised before the Registration Officer and the revising authority. The electoral roll thereafter becomes final and every person included in it has a Constitutional right to vote at the election to which it relates. In

Ghulam Qadir v. Ahmed Shafi(39), the petitioner's election was set aside, on the election petition filed by the respondent, on the ground that a large number of voters, who had cast their votes were minors. The High Court set aside

37). Electoral College Rules, r.23(2).

38). Electoral College Act, S.13(1) as amended by S.6 of the Electoral College (Amendment) Act 2 of 1967. By the amendment the words "not amended and corrected under section 8 or revised under section 12" were substituted for "not revised under section 12".

39). P.L.D.1967 L.68.



the order of the Tribunal; it was held that persons entered on the electoral roll have a right to vote and the Tribunal had no authority to examine whether certain voters were disqualified to vote on the ground of age.

The Returning Officer is, in relation to the elections of the Electoral College, the President and the Assemblies, specifically prohibited from enquiring into the correctness and validity of any entry in the electoral roll (40). S. 23(3) proviso (iii) of the Electoral College Act reads:-

"the Returning Officer shall not enquire into the correctness or validity of any entry in the electoral roll."

The provision has been the subject matter of judicial interpretation. In Ahmed v. Mir Md. (41), Anwarul Haq, J., observed:-

"At first sight, the proviso does appear to indicate that the entries in the electoral roll are final for all purposes, but on a scrutiny of the various provisions contained in the Act as well as the Electoral College Rules, relating to the preparation of the electoral roll, it becomes clear that that the elaborate procedure prescribed therein is directed only towards one end, namely to ascertain whether a person is eligible to exercise the right of vote."

Anwarul Haq, J., was also a member of the full Bench in Md. Tufail v. Md. Salim (42), in which this question was

40) Electoral College Act, S. 23(3) proviso (iii); Presidential Election Act, S. 18(3) proviso (iii); National and Provincial Assemblies (Elections) Act, S. 14(3).

41) P.L.D. 1966 L. 927 at p. 930. (42) P.L.D. 1967 K. 104.

thoroughly examined. The petitioner and respondent were candidates for election to the Electoral College. At the time of scrutiny, the petitioner objected to the respondent's candidature on the ground that he was less than twenty-five years of age (being shown as twenty-three years of age on the electoral roll). The objection was rejected by the Returning Officer on the respondent producing a counter affidavit and an age certificate from the police surgeon that he was above twenty five years; at the election the respondent was elected. Before the High Court the question was, whether it was open to the Returning Officer to go behind the entry of age in the electoral roll, in view of the provisions of S.23(3). In the respondent's submission, S.23(3) enjoined the Returning Officer, in clear and unambiguous language, not to enquire into the correctness or validity of any entry appearing in the electoral roll and that the finality attaching to the electoral roll extends to the qualifying age of a voter as well as the candidate. The Court by a majority decision (Qadeeruddin, J., Contra) rejected the respondent's contention. Anwarul Haq, J., with whom Waheuddin, J. concurred, said,

"The injunction contained in the proviso cannot be interpreted in a manner which would confer a status on and finality on the electoral roll which it was not intended to possess by these provisions of the Act

and the Rules, under which it has been prepared. The finality which therefore attaches to the electoral roll and the restraint which is placed on the Returning Officer under the third proviso to section 23 of the Electoral College Act must be interpreted to mean that the Returning Officer shall not question the right to vote of either the candidate or his proposer or seconder while scrutinising a nomination paper. If an objection is raised regarding the fulfillment of a candidate of the requirement of age as prescribed by clause (1) of Article 158, it is incumbent upon the Returning Officer to satisfy himself that the requirement is in fact fulfilled and he can in doing so go behind the entries in the electoral roll."

(43)

It follows that the electoral roll is binding on the Returning Officer to the extent that a person, whose name is on the electoral roll, has an unrestricted right to vote at the election to which the roll relates, and for no other purpose. In other words, an electoral roll is not final or

- 43). P.L.D. 1967 K.104 at p.119. The dissenting Judge based his view on a strict interpretation of the provision. He said, "Whatever difficulties there might be existing in good and sound drafting of legal provisions, our system of law must be supported and strengthened by the Judges by giving effect to clear provisions of law and the express intention of the Legislature uninfluenced by self inclinations, however esteemable their motives", at p.129.



sacrosanct qua the individual entries contained therein. This is discussed below. But, first a few words as to the competence of the Election Tribunal to go behind entries in the electoral roll. There is a divergence of opinion on this point.

In Ghulam Abbas v. Additional Commissioner (44), the petitioner's election to the electoral College was set aside by the Tribunal on the ground that a number of persons who voted were less than twenty-one years of age. A division Bench of the West Pakistan High Court held that the Tribunal cannot question the entries in the electoral roll, because:

(a) if the intention of the Legislature was not to make it conclusive, the Returning Officer would not have been forbidden to go into the correctness or validity of any entry in the electoral roll,

(b) finality being given to the orders of the revising authority, an objection to entries in the electoral roll could not be gone into by another authority, and the election tribunal is a creature of the Electoral College Act and the Rules,

(c) the Returning Officer, who is the chief scrutinising officer, having been debarred from going into the correctness or validity of any entry in the electoral roll, it

was necessary to put a further prohibition with respect to the election tribunal, and

(d) there was no provision for making a voter a party in the election petition.

From the above decision it appears that entries in the electoral roll are binding on the election tribunal, irrespective of whether they are in respect of the voter or the candidate. But a recent decision of the West Pakistan High Court reported as Md. Yusuf v. Karam Dad (45) has distinguished the decision in Ghulam Abbass's Case (46) on the ground that it is based on the right of a voter and not the qualification or disqualification of a candidate. Even the Karachi Bench, in a later case (47) held that the tribunal has ~~the~~ power to go ~~xxx~~ into "requisite" entries <sup>made</sup> in the electoral roll. In that case the Tribunal had set aside the petitioner's election on the ground that his nomination was proposed by a voter, who was less than twenty-one years of age. So, the position ~~xxxxxxxx~~ of the election tribunal is similar to that of the Returning Officer. It is submitted that the decision in

45). P.L.D.1968 L.30..

46). P.L.D.1965 K.625.

47). Ghulam Rasool v. Deputy Commissioner, P.L.D.1966 K.151.

the case under discussion, is, however, open to the following criticism:-

Although the law specifically ousts the jurisdiction of the Returning Officer to question the entries in the electoral roll, it makes no corresponding provision in the Act or the Rules concerning the election tribunal. The Rules only say that the decision of the Registration Officer is final(48). Rule 19 reads: "Every decision of the revising authority under rules 14, 15, 17 and 18 shall be final". It will be observed that the words, "and shall not be questioned by any authority" are not in the provision cited, and it would be dangerous to imply such words in a statute. The learned Judges have further held that, if the intention of the Legislature was to allow a candidate to challenge the electoral roll in an election petition, it would have been provided that the voter, whose right to remain on the electoral roll is challenged, should be made a party. It is true that the right of franchise is a Constitutional one and cannot be taken away without affording an opportunity to show cause to the voter but there is, it is submitted with great respect, no bar to a voter being made a party to these proceedings. Voters who have been denied their right to vote at an election

48). Electoral College Rules, r.13(5), (6) and r.14.

can be added as per forma respondents to the election petition to have the election declared void in toto under R.35(c) of the Electoral College Rules.

In Ahsan Ali v. Ghulam Ali (49), the election of the petitioner was set aside by the Election Tribunal, which found that he had not attained the qualifying age on the date of his nomination. The petitioner was shown as being twenty-seven years of age on the electoral roll and no objection ~~an~~ had been taken to this entry at any stage of the preparation of the electoral roll or at the time of scrutiny of the nomination paper. The question for determination was whether the election tribunal, constituted under the Electoral College Act, was competent to go into the question of the age of the petitioner and set aside the petitioner's election. Chaudhury and Sayem, JJ., observed,

"Sufficient remedies having been made available for the correction of the electoral roll, the age ~~of the~~ as shown in the same appears to have been taken as the conclusive evidence of age of a candidate and it is not contemplated in the Act that it should be reopened.

- 49). P.L.D.1966 D.4. The decision has not been followed in later cases; Abdur Ghafur v. Nur Md., P.L.D.1966 L.423 and Abdur Rashid v. Mahmood Sadiq, P.L.D.1966 L.216, where it was specifically dissented from.

According to the entry in the electoral roll the Constitutional requirement has been fulfilled. So, a question of disobedience to a command of the Constitution does not arise. Suffice it to say that the election tribunal has not been saddled with the responsibility of examining once again the question of age. We are of the opinion that it has to proceed on the basis of the electoral roll."(50)

But the later decisions of the High Court(51) have taken the consistent view that an election tribunal, like the Returning Officer, has the power to go into qualifications and dis-qualifications of a candidate. In Abdur Rashid v. Mahmood Saig(52), the petitioner, respondent No.2 and respondent No.3 contested an election to the Electoral College; the petitioner, having secured the highest <sup>number of</sup> votes, was elected. Before the Election Tribunal documentary evidence was produced to show that the returned candidate was below twenty-five years of age on the nomination day and to contend that he was, under ARTICLE 158(1) of the Constitution, disqualified from contesting the election. The Election Tribunal set aside his election and declared respondent No.2 elected instead. Before the High Court it was

50). Ibid., at p.47.

51). Abdur Rashid v. Mahmood Sadiq, P.L.D.1966 L.216; Abdul Ghafur v. Nur Md., P.L.D.1966 L.423; Ahmed v. Mir Md., P.L.D.1966 L.927; Md. Tufail v. Md. Salim, P.L.D.1967 K.104; Md. Yusuf v. Karam Dad, P.L.D.1968 L.30.

52). P.L.D.1966 L.216.

argued that the entry of the petitioner's age was final qua the tribunal, which was not entitled to go behind it. The Court dismissed the petition and held that the question of age could be examined by the Tribunal. It was held,

"Since the entry in the electoral roll, regarding the age of the petitioner could be challenged in an election petition and since the question of age of the petitioner was in issue in the election petition, the Election Tribunal had come to its own finding on its own appraisal of the data before it." (53)

In Abdul Ghafur v. Nur Md. (54), the Court based its decision on ARTICLE 171(1) of the Constitution. Chauhan, J., said,

"A perusal of the Article will show that with regard to 'election disputes' the ultimate forum is to be the Election Tribunal, and it is the decision of the Tribunal which is to be given finality and not the decision..... of the administrative officers concerned with the preparation and conduct of the election. If from the various provisions of the Act it is to be concluded that finality attaches to entries in the electoral roll, then this will mean that the mandate given by the Constitution, so as to make the Election Tribunal as the

53). Ibid., at p. 219.

54). P.L.S. 1966 L. 423. ART. 171(1) makes provisions concerning disputed elections. It is discussed in Chapter 8 (Election Dispute) and Chapter 9 (Jurisdiction of Courts).

final arbiter will be defeated.....The jurisdiction of the Election Tribunal under the Electoral College Act has been deliberately kept very wide and unrestricted so as to enable it to go into all types of "election disputes". Disputes of age in the present case being essentially an election dispute, it will not be reasonable to hold that it has been excluded from the jurisdiction of the Election Tribunal, whereas all other disputes are included." (55)

~~The decision in Ahmed v. Mir~~

The decision in Ahmed v. Mir Md. (56) was based on ARTICLE 158(1) of the Constitution. It was held that an election tribunal is under an obligation to ascertain the age of a candidate, so as to ensure that it is the minimum age of twenty-five years prescribed by the Constitution; otherwise the election tribunal would be acting in violation of the Constitution and, as observed by S.A. Mahmood, J., in Md. Yusuf v. Karam Dad (57), "its action would amount to placing a premium on dishonesty, and perpetuating a fraud, which a person may practise by misrepresenting his age, in order to qualify himself for being returned as a member against the mandate

55). Ibid., at p. 428.

56). P.L.D. 1966 L. 927. ART. 158(1) reads: "The persons enrolled on the electoral roll for an electoral unit shall, in accordance with law, from time to time elect from among themselves a person who is not less than twenty-five years of age, who shall be known as the elector for that unit".

57). P.L.D. 1968 L30.



of the Constitution". To the same effect is the decision of the Peshawar Bench in Khan Faraz v. Md. Iqbal (58) and the Karach Bench in Md. Tufail v. Md. Salim (59). Finally, reference may be made to the decision of the Supreme Court in Intiaz Ahmed v. Ghulam Md. (60) where Cornelius, J., as he then was, relying on two English decisions (61), said,

"It is settled that every person whose name is entered on the electoral roll is entitled to vote at the election to which it relates, unless there be some personal disqualification" (62)

It is submitted that an election tribunal should go behind entries in the electoral roll more particularly, for the

58). P.L.D.1967 P.41.

59). P.L.D.1967 K.104.

60). P.L.D.1958 S.C.238.

61). Stowe v. Jolliffe (1874) 9 L.R.C.P.734, where it was held that the register is conclusive on a Returning Officer, as well as on any tribunal which is to enquire into the election unless there be some personal disqualification; Prembroke Borough Case (1905) 5 O'M. & H.135, where it was held that the register is conclusive and the people whose names are mentioned on it are presumed to have the necessary qualifications and that it is necessary to raise all questions as to the right to vote before the Registration Officer and the revising authority and that this had been done by preventing any such question from being raised at any other time, or in any other manner.

62). P.L.D.1958 S.C.238 at p.241.



1) There is no express bar ousting its jurisdiction, such as is contained in S.23(3) proviso (iii), concerning lack of necessary power in the Returning Officer;

2) The Returning Officer being held competent to go into such entries, it is desirable that the election tribunal, to whom the election petition lies, should be able to test the correctness of the decision of the Returning Officer;

3) S.60 of the Electoral College Act read with r.36 of the Electoral College Rules, give wide powers to the election tribunal, constituted thereunder, to decide all election disputes; the question whether a candidate is qualified or disqualified is an election dispute.

It is submitted, with respect, that the reasoning based on ARTICLE 158(1), prescribing twenty-five years as the age for election, is not sound. The learned Judges have, it is again submitted with respect, omitted to note that a voter, too, must be twenty-one years or over by virtue of a Constitutional provision namely ARTICLE 157. So, if we accept this reasoning, we must also allow the election tribunal to go into the question of age of the voter. But we have already seen that the authorities are against such a proposition. So, although an electoral roll is to be acted upon in all matters relating to an election, it is final only with regard to the right of a particular person to vote. It is always subject to the said

qualification. But it is different from saying that individual entries in an electoral roll are conclusive. In the case of Fehboob Ahmed v. Controlling Authority (63), the order of the Controlling Authority was assailed, inter alia, on the ground that he had no jurisdiction to go behind the electoral roll of 1958, in which the petitioner's ~~name~~ age was shown as twenty-five years, because the electoral roll was conclusive with regard to the particulars mentioned therein. The Controlling Authority removed the petitioner, setting aside his election as a member and chairman of the Union Council on that score. Anwarul Haq, J., with whom Yaqub Ali, J. concurred, said,

"The conclusiveness which attaches to an electoral roll is only with regard to the right to vote enjoyed by a particular person whose name appears in the electoral roll, but with regard to no other matter." (64)  
(the underlining is by the author)

In Ahmed v. Mir Md. (65), the same learned Judge observed,

"The determination of the exact age is not contemplated by any provision of law dealing with the preparation of the electoral roll...  
....Article 158 of the Constitution.....  
lays down that persons concerned should be enrolled as voters on the electoral roll of the unit concerned and should not be less than 25 years of age. In other words, the qualification

63). P.L.D.1961 B.J.15.

64). Ibid. at p.19. At the relevant time the law was the Electoral Rolls Act, 1957, provisions whereof have been incorporated in the Electoral College Act/Rules, 1964.

65). P.L.D.1966 L.927.

qualification of age has to be satisfied independently of the entries appearing in the electoral roll."(56)

(the underlining is by the author)  
In Manzure Aleem v. Zahoor Hussain(67), it was held that the Constitutional requirement of the age of a candidate as laid down in ARTICLE 158, must be fulfilled independently of the entries in the electoral roll. The decision was quoted with approval by the full Bench in Md. Tufail v. Md. Salim(68). In Md. Yusuf v. Karam Dad(69), S.A. Mahmood, J., said,

"There is no real adjudication of the question of age by the election authorities.....the electoral roll must be considered as specifying the minimum requirement of age, which would confer on him the right to vote, but no other question can flow from such a entry".(70)

The position is different in India. An entry in the electoral roll is not conclusive proof that a person has the requisite qualification. It has been held that the tribunal has power to ascertain and determine the real age(71). The view

66). Ibid., at p. 930.

67). P.L.D. 1965 L. 262.

68). P.L.D. 1967 K. 104.

69). P.L.D. 1968 L. 30.

70). Ibid., at p. 39.

71). Parkash Narain v. Jagdish, (1953) 4 E.L.R. 205, Subrahmanyam v. Abdul Hamid, (1952) 1 E.L.R. 432.

is aptly expressed in the following words:-

"To be of a proper age required for being an elector or candidate is a statutory qualification, the absence of which is a disqualification, about which there is ~~now~~ no waiver. If a person is really below 21 years or 25 years, which are the qualifying ages for an elector and candidate respectively, then he is inherently lacking in the statutory qualification to become either an elector or a candidate, as the case may be." (72)

72). Hakikat Ullah v. Nathu Shah, (1953) 6 E.L.R. 10 at p. 20.

Chapter 4THE CANDIDATE

This chapter deals with the qualifications which a candidate for the Electoral College or an Assembly should possess and the disqualifications which he may incur under the law. Qualifications or disqualifications common to both will be treated together and those peculiar to the one will be discussed separately. The law relating to nominations will also be considered.

Qualifications

ARTICLE 158(1) of the Pakistan Constitution, which prescribes the qualifications for a candidate to the Electoral College, is as follows:-

"The persons enrolled on the electoral roll for an electoral unit shall, in accordance with law, from time to time, elect from among themselves a person who is not less than twenty-five years of age, who shall be known as the elector for that unit."

The Constitution has laid down two major qualifications: the candidate must have attained (a) the age of twenty-five years, (b) his name must be entered on the relevant electoral roll. This implies, that besides being of the prescribed age, the candidate must also be qualified as a voter. The latter

presupposes a number of qualifications, which have been set out in the previous chapter (1) and should be read as a part of the constitutional provision quoted above.

A candidate for the National or a Provincial Assembly must also have attained the age of twenty-five. If he is a candidate for a seat in the Provincial Assembly, his name must be borne on the electoral roll of an electoral unit in that province. For a seat in the National Assembly, it is sufficient that his name should have been entered on ~~any~~ electoral roll (2). The National and Provincial Assemblies (Elections) Act, enacted under ARTICLE 164 of the Constitution, further provides that a candidate must not be disqualified from being elected under the Constitution or any other law in force (3).

According to ARTICLE 158 (1) persons on the electoral roll for an electoral unit are to elect from among themselves a person who is not less than twenty-five years of age; S.21 (1) of the Electoral College Act provides that a voter may propose or second the name of a person who is "duly qualified" to be a member of the Electoral College. S.12(1) of the

1). Namely, Chapter 3.

2). Constitution of Pakistan (1962) ART.103(1).

3). National and Provincial Assemblies (Elections) Act, 1964. S.12 (2).

National and Provincial Assemblies (Elections) Act is to the same effect. Subsection (2) of the last mentioned Act further states that a person is "Qualified to be elected" as a member of an Assembly, if he is not under twenty-five years of age. One may, therefore, ask on what date must he have attained the specified age. Should it be the date fixed for nominations, the date of the poll or the day when the election result is announced? The answer seems to be that the material date is the day on which nominations are filed. In other words, the words "duly qualified" have reference to the day when the voters or the electors (as the case may be) are called upon to nominate their candidates. Those in favour of the opposite view contend that the date of presentation of nomination papers, being only a step in the process of election, the relevant date is the date on which the election is completed, that is to say, after the entire election programme is over. A single case is reported under the Basic Democracies Order, 1959, where this view has been accepted (4). The High Court of West Pakistan itself took a contrary view, a year later in the case of Md. Nazim v. Said Md. (5). In that case the nominations were filed on 3.12.59,

4). Irfan v. Election Tribunal P.L.D.1961 L 189.

5). P.L.D.1962 L 421.

polling took place between the 26th and 29th December, and the result was declared on 10.1.60. Under the law then in force a candidate had to be twenty-five years of age on the first day of January preceding the election (6). The returned candidate, respondent before the High Court, who was born on the night following the 31st day of December 1934, was twenty-five years of age on 1.1.60, so he was below twenty-five years of age on the nomination day, viz. 3.12.59. It was held that the age had to be reckoned from the "nomination day" and the respondent was disqualified. Kayani, C.J., giving the Judgement of the Court, said -

"We find it difficult to hold that the age of a candidate should be determined with reference to the final stage in the process of elections. If election is a single process from the date of publication of the electoral roll to the date on which the result of the election is declared, like a chain with a number of links, then the date preceding the election will be a date preceding the first link in the chain and not a date preceding the last link; for a date preceding the last link would be a date preceding the declaration of the result, and all other links in the chain would precede such date. In that case we would be defining the term election as the publication of the result of the election". (7).

- 6). Basic Democracies Order, 1959, Second Schedule, Part II, para. 1.
- 7). Md. Nazir v. Said Md. P.L.D.1962 L 421 at p.423.



The position is much simpler under the present law. S.72 of the National and Provincial Assemblies (Elections) Act enumerates the grounds on which the election of a returned candidate may be declared void. One such ground is that the returned candidate was, on the "nomination day", not qualified for, or was disqualified from being elected to the seat (8). "Nomination Day" is defined as a day fixed by notification for filing the nomination papers (9); a similar definition is given in the Electoral College Act (10). Again at the time of scrutiny, the nomination paper of a candidate, who is not qualified to fill the seat for which he has been "nominated", must be rejected (11). It, therefore, follows that the material date should either be the nomination day or the day on which scrutiny takes place. But in both Acts the "nomination day" and the "scrutiny day" are distinctly defined (12). Reading all these provisions together, the conclusion is inescapable that the qualifications for a candidate to the Electoral College or the Assemblies, and the disqualification to which he may be subject, must all have reference to the date of filing the nomination papers, which is the crucial point of time in this regard.

- 8). National & Provincial Assemblies(Elections)ACT S.72(1)(b)
- 9). Ibid S.2 (16) read with S.11 (1)(a).
- 10). S. 2 (11) read with S.19 (a).
- 11). National & Provincial Assemblies(Elections)Act S.14(3)(a) Electoral College Act. S.23 (3)(a).
- 12). National & Provincial Assemblies (Elections)Act S.2(16) read with S.11(1)(a) and S.2(25)read with S.11(1)(b); Electoral College Act.S.2(11)read with S.19(a)and S.2(22) read with S.19(b).

There are Obiter dicta of the High Court of West Pakistan (14) in Manzur Aleem v. Zahur (13) and Abdul Ghafoor V. Nur Ahmed that a person must be twenty-five years of age on the day the nomination paper is filed, but the matter has not actually been decided in any court.

Under S.100 (1) (9) of the Indian Representation of the People Act, 1951 a Tribunal may declare the election of the returned candidate to be void "if on the date of his election he was not qualified, or was disqualified, to be chosen to fill the seat". The date of election is defined as the date on which the candidate is declared by the Returning Officer to be elected (15). Thus even if a candidate was qualified and was not disqualified on the date of his nomination(16), if he loses the qualification or incurs a disqualification by the date of his election, he will cease to be a qualified candidate. The position in India differs from that under the Pakistan Acts.

Although a very large section of the public are against the return of semi-educated or illiterate persons, the law does not prescribe an educational qualification for a candidate to the Electoral College or an Assembly. At the last elections a large number of illiterate persons were returned as members of the Electoral College and the Assemblies

13). P.L.D.1965 L 262.

14). P.L.D.1966 L 423.

15). Representation of the People Act 1951 S.67 - A.

16). Overleaf

the majority of the members of the Electoral College are illiterate.

Those against the incorporation of education as a qualification say that it is desirable but not necessary. According to them, for the successful working of a democracy education is not an essential qualification; no matter how ignorant a man is, in a democratic country, if he possesses enough common sense to know what is good for the country, electors should be allowed to elect him to represent them; there should be no such checks on their free will (17). It is submitted that, although these reasons may apply, with some force to voters, they are not relevant to the qualifications of a candidate for election to an Assembly or the Electoral College in Pakistan, in view of the special conditions prevalent there. In England and the United States of America, education is compulsory and free. It is not so in Pakistan and the percentage of illiterate people is still large (18). It is submitted that matriculation (equivalent to G.C.E. 'O' Levels) should be the minimum qualification for a member of an Assembly. It is further submitted that a

- 16). S.36 (2)(a) states that the material date for the qualification or a disqualification of a candidate for the purposes of scrutiny of nominations is the date of scrutiny itself.
- 17). Report of the Electoral Reforms Commission, 1956 (published in the Gazette of Pakistan extraordinary issued dated 24.4.56).
- 18). According to the 1961 Census the literacy percentage was 15.9%. (17.6% in the case of East Pakistan and 13.6% in the case of West Pakistan).

similar qualification should be required from those seeking elections to the Electoral Colleges. A member of the Electoral College (19), besides electing the President of Pakistan and Members of Assemblies, has to perform functions relating to local government under the Basic Democracies Order, 1959 (20), to perform which literacy is either essential or highly desirable but unfortunately, some of them have been discovered to be unable to sign their names.

Indirect elections were introduced because the average Pakistani qualified to vote was considered incapable of exercising an intelligent choice in the selection of the President or a member of an assembly. The object will remain unfulfilled unless candidates to the Electoral College are to bear some kind of educational qualification.

19). Commonly referred to as a Basic Democrat.

20). For instance, a Chairman Union Council is chosen, under the Election of Chairman Rules, 1960, from among Basic Democrats, and, inter alia has power to hear disputes pertaining to Muslem Family laws.

Persons in the Service of Pakistan

A government servant by virtue of his position and authority can bring pressure to bear upon the electors. Since any form of official influence in elections amounts to a form of corruption, destructive of the democratic principle and because to allow him to do so would create a conflict between his duty and his ambition, a public servant is not normally allowed to contest an election. A person holding office of profit in the service of Pakistan, other than President of Pakistan, Governor of a Province or a Central or Provincial Minister is disqualified from being a candidate for the Electoral College or an Assembly (21). The provision has three necessary ingredients: one, existence of an office; second, the office should be in the service of Pakistan and third, the office must be capable of carrying profit.

Office may be defined as a position of place to which certain duties are attached more or less of a public character. (22). In the context, the term office may have the following characteristics:

- 21). Constitution of Pakistan (1962)ART.103(2)(a)read with Sub ART.(3), Electoral College Act. S.53(1)(b) read with ART. 103 (3) of the Constitution. The position regarding a candidate to the Assembly has been altered by the Constitution(Third Amendment) Act 1965.ART 103 (2)(a) has been amended and a new Schedule has been added to the Constitution. Persons holding the offices specified in the new Schedule are no longer disqualified from being members of an Assembly in Pakistan.
- 22). Yograj v. Sitaram (1953) 3 E.L.R.439.

- (i) it should be independent of the person holding it, that is to say, the office must exist notwithstanding whether the person is there or not;
- (ii) it should be for a specified period; and
- (iii) there must exist a relationship of master and servant between the government on one hand and the person holding the office on the other (23).

"Service of Pakistan" is defined in the Constitution as any service, post or office in connection with the affairs of the Centre or of the Province and includes an All Pakistan service, any defence service or any other service, which may be declared as a service of Pakistan by law; but does not include service as a Speaker, deputy Speaker or other member of an Assembly or a Parliamentary Secretary (24). It has been held that in determining whether one holds a government service, the power of the government to appoint, or to continue him in service, or to revoke his appointment, at its discretion, are relevant factors (25).

An office may or may not carry with it any remuneration; here we are concerned with one which does. The word "profit" necessarily carries with it the idea of gain or advantage <sup>in-</sup> however/significant. Consideration paid in the shape of remuneration, salary, "sitting fee" or "attendance fee" has

23). Hoti Lal v. Raj Bahdur (1958) 15 E.L.R.55.

24). Constitution of Pakistan (1962) ART.242.

25). Maulana Abdul Skakoor v. Rikab Chand (1958)13 E.L.R.149, Krishanappa v. Narayan Singh (1953) 7 E.L.R. 294.

been held to constitute profit (26). Out of pocket expenses are, however, not within the scope of the term. This brings us to the expression "office of profit" which, one must readily concede, is not particularly easy to define.

In Henry v. Galloway (27), a case stated by the Commissioners for the general purposes of the Income Tax Acts, (28) a director of limited company received a certain salary as a director. During the year of assessment he received no salary but had received a salary in the previous year. He was assessed to income tax for the year of assessment in respect of his salary as directed<sup>of</sup> computed on the amount of such salary received during the previous year. The case called for an interpretation of "office of profit". Finlay J, observed as under:

"Now office of profit is not a thing particularly easy to define; everybody, I think, has a good idea of what it means, but certainly it is not easy of exact definition.... It is, of course, and must be an office, and no doubt it must be

- 26). In the matter of Vindhya Pradesh Legislature Assembly, (1953), 4 E.L.R.422.
- 27). (1933) 148 L.T.453;
- 28). Income Tax Act, 1918 (8 & 9) Geo.5 C.40). On behalf of the respondents it was contended that tax was only chargeable on the profits of "an office of profit" and when on 21.8.29 the emoluments ceased in respect of the respondent's office of director he ceased to hold such an office; the appellant, Inspector of Taxes, argued that merely because in a particular year no profits are received, although the respondent had continued to hold the office, he did not cease to hold an office of profit. The appeal was accepted.

"an office to which remuneration is in some way or the other attached. You cannot have an office unless you have got remuneration attached to it. That does not, of course, mean that in any particular year there must necessarily be any remuneration. It is, I should think, clear beyond any controversy .... that if you take the case, the perfectly possible case of a holder of an office remunerated by share of profits and by reason of the fact that in difficult times there are no profits so that there is no remuneration; it cannot be questioned that that would nevertheless be an office of profit". (29)

A similar view was expressed in Shivarama v. Venkataram (30), in the following words:-

"What constitutes an office of profit does not admit of ready answer. If the nature and construction of the word "profit" is any guide, we may assume that the remuneration should be attached to the office".

Again in May's Parliamentary Practice (31) it has been observed,

"what constitutes an office or place one of profit is often a question of difficulty as well as urgency... The principle that has been adopted is that, if emoluments have been attached to the office, the fact that emoluments are not received by a particular holder is irrelevant."

If, therefore, follows that an office, in order to disqualify a candidate, must be held under the Government and that pay, remuneration, salary, emolument or allowance must be attached. If there is gain, its quantum or amount will not be material.

29). (1933) 148 L.T.453 at p. 454.

30). (1953) 3 E.L.R. 187 at p. 193.

31). The Law, Privileges, Proceedings and Usage of Parliament (1957 Edition), p. 214.



But the amount of money receivable by a person in connection with the office he holds may be material in deciding whether the office really carries any profit.

As mentioned earlier (32), ARTICLE 103 of the Constitution which prescribes the various disqualifications for a candidate to the Assembly has been amended by the Constitution, (Third Amendment) Act, 1965. S.2 of the Amending Act states that "in ARTICLE 103 (2) in clause (2) in paragraph (a) after the word "Pakistan" the words "other than an office specified in the Fifth Schedule" shall be added and shall be deemed always to have been so added". By its S.4, the same Act added the Fifth Schedule to the Constitution. So persons holding the following offices are not disqualified from becoming Members of an Assembly in Pakistan:

- 1) An office which is not a whole time office remunerated either by salary or by fee.
- 2) Offices of Lambardar, Inamdar, Sufedposh, Zaildar, whether called by this or any other title.
- 3) The office of the Chairman of the Union Council, Union Committee and Town Committee and of the Vice-Chairman of the Municipal Committee and District Council.

32). See footnote 21 ante.

- 4 (i) The Pakistan Army Regular Reserve of Officers
  - (ii) The Pakistan Army Regular Reserve of Junior Commissioned Officers
  - (iii) The Pakistan Army Supplementary Reserve of Officers
  - (iv) The Pakistan Army Supplementary Reserve of Junior Commissioned Officers.
- 4(b)(i) The Pakistan Naval Volunteers Reserve
- (ii) The Pakistan Naval Reserve
- 4(c) The Air Force
- (i) The Pakistan Air Force Regular Reserve
- (ii) The Pakistan Air Force Volunteer Reserve
- 5) The Ansars raised under the Ansars Act, 1948 (East Bengal Act 3 of 1948)
- 6) Any office the holder whereof, by virtue of holding such office, is liable to be called up for military training or military service under any law providing for the constitution or raising of a force.
- 7) Any office declared by Act of the Central Legislature not to disqualify its holder from being elected or as being a member of an Assembly.

The Amending Act, 1965, is a validating piece of legislation for it stated:

" a person holding any of the offices specified in the Fifth Schedule to the Constitution as added by this Act who has been elected as a member of an Assembly before commencement of this Act shall not be and shall be deemed never to have been disqualified from being elected as a member of an Assembly, and, notwithstanding anything in the Constitution, the election of such person shall not be questioned merely on the ground that he held any such office at the time when he was elected". (33)

33). The Constitution (Third Amendment) Act 1965 S.5. The Act came into force on 15th June, 1965.

### Officials of Statutory Corporations

Officials of a public statutory corporation or a local council are in a position similar to persons "in the service of Pakistan". While the grounds for disqualifying them are the same, the provision of law is different. S.53 of the Electoral College Act provides: "a person shall be disqualified from being, or being elected as, a member of the Electoral College, if he is a wholetime salaried official of a public statutory corporation or a local council". (34)

The important words are "wholetime" and "salaried official", which call for an explanation. "Wholetime" work denotes daily engagement or employment during routine normal hours for the entire day; a temporary or periodical cessation of work or pay in continuing service is of no consequence. It will make no difference if, during a particular interval, a person does no work, being either on leave for some reason, provided he continues in a service which involves a wholetime appointment. A person in receipt of a salary means one who is in the habit of receiving a salary as a normal condition of the service in which he continues to remain.

In Muklesar v. Sub Divisional Officer (35), the High Court of East Pakistan dealt with the identical provision, under the Basic Democracies Order. The question was whether a person

34). S.53 (1)(d). S.102 of the National and Provincial Assemblies (Elections) Act is also to the same effect.

35). P.L.D.1963 D 497.

on suspension can be treated as a wholetime salaried official. It was argued that such a person is neither a wholetime or a salaried official. Murshed, J., (now Chief Justice) said that the following question should be formulated in such cases - Is he still in service which entails a payment by way of emolument for work habitually rendered or for continuing liability to render service when called upon to do so? It was pointed out that temporary interruption of work should not always be taken as the decisive factor.

Thus a person, in whose favour a certificate of part-time employment is issued, may contest an election, although the decision whether he should be allowed to continue in service after his election, will rest entirely with the authority which employs him. It may also be mentioned that persons performing public functions and receiving remuneration therefor in addition to their income from their normal vocations may also be eligible for election in certain cases. So a lambaradar (village headman) will not be disqualified on the ground that he collects land revenue and receives a percentage amount collected by him as remuneration, nor is a Chairman of Union Council by reason of the fact that he performs a public function and receives an honorarium in relation to it.

The wife of a person in the service of Pakistan will be disqualified from being or being elected as a Member of the Electoral College or an Assembly (36). It is interesting to note that the wives of the President, the Governors and Ministers are, however, eligible (37) but whereas their husbands would automatically cease to hold their respective offices upon being elected to the Assembly (38), the rule does not apply to the wives. This, it is submitted, is against the spirit of the law and the purpose for which it has been enacted. It may be mentioned that in response to a questionnaire issued by the Pakistan Electoral Reforms Commission in 1955, it was a common grievance that all near relatives of a public servant should be disqualified from seeking election from a constituency which could be said to be under his direct influence. It was pointed out that Government servants were actually participating in party and factional politics through their wives, children, fathers and brothers. More than fifty persons elected to the Panjab Legislative Assembly owed their success to their very close relationship to public servants. It was contended that relations should be disqualified from seeking election because the choice before the public servant was between loyalty to his dear ones

36). Electoral College Act. 53 (1)(g), National & Provincial Assemblies (Election) Act. S.101;

37). Ibid.

38). Constitution of Pakistan (1962) ART.103 (3).

and loyalty to the principles of honest public service; it was unfair to put such a heavy strain upon the honesty of public servants. To this the Commission did not agree but ruled that wives of Government servants would continue to be disqualified as otherwise the women's seats would be reserved for families of public servants. This was given effect to by the National and Provincial Assemblies (First Elections) Order (39), under which the first elections under the 1962 Constitution were held. It also finds a place in the present laws. But by omitting to disqualify the wives of the President, the Governors and Ministers, has the much desired effect been achieved? An amendment deleting the words "not being a person mentioned in clause (3) of ART.103" from S.101 of the National and Provincial Assemblies Act and S.53 (1)(g) of the Electoral College Act is clearly called for.

A very interesting situation arose in the case of Begum Shamsunhar (40), an elected Member of the Provincial Assembly of East Pakistan, who subsequent to her election, got married to a Divisional Commissioner. The Speaker referred the matter to the Chief Election Commissioner, who ruled that she had become disqualified under ART 72 of the National and Provincial Assemblies Act (39). President's Order 4 of 1962.

40). P.L.D.1965 S.C. 120.



Assemblies (First Elections) Order, 1962 (41). The Speaker then issued a notification that "Begum Shamsunhar is not a Member of the Assembly". This was challenged in the High Court but without success. Before the Supreme Court it was argued that the disqualifications mentioned in **article 76** of the Order, contemplated the status of the member at the time of her election and could not have any application to events which took place after the election. The Court repelled the argument and held that the appellant was disqualified.

#### Dismissed Servants

Dismissed government servants and employees of a statutory corporation, whether compulsorily retired or otherwise removed, are disqualified for five years from becoming members of the Electoral College or an Assembly. Persons against whom such action is taken only on the ground of inefficiency are, however, eligible (42).

The services of a government servant in West Pakistan, for example, may be dispensed with under the **Government Servant (Efficiency and Discipline) Rules, 1960** or the **Government Servants (Further Usefulness in Public Service) Rules 1963**. The scope of the former is very wide and covers

(41). Provision identical with S.101 of the National and Provincial Assemblies (Elections) Act, 1964.

(42). Electoral College Act. S.53 (2)(b) read with S.53(1)(h); National & Provincial Assemblies (Elections) Act. S.106 (1)(b) read with S.102.

all cases in which there is an allegation of misconduct, corruption or inefficiency. Under the latter set of rules, an order of retirement can only be passed (a) when a person is due to complete twenty-five years of service, qualifying him for pension and (b) when he is about to complete the 55th year of his age; the application is confined to a case in which the "further usefulness of a person" is to be determined. It will be apparent that a person dismissed or removed under the 1960 Rules comes within the mischief of S.53 of the Electoral College Act and S.106 of ~~the~~ Assemblies (Election) Act but a person retired under the 1963 Rules does not. In Md. Siddique v. Ahmed Khan (43), the election of the returned candidate for the constituency N.W.47 Sialkot, was challenged on the ground that, as he had been compulsorily retired from Government service, on grounds other than that of inefficiency, he was disqualified from being elected as a Member of the National Assembly. The respondent had served in the Army for six years and was later appointed a Superintendent of Jails and had a fair service record. The order of compulsory retirement in 1964 recited that he had "outlived his usefulness". Masud Ahmed, J. Chairman of the Election Tribunal, held that these words could not be said to indicate that the respondent was made

43) P.L.D.1966 J.128,



to retire because he was inefficient.

The National and Provincial (First Elections) Order, 1962, which laid down the law in respect of first elections under the 1962 Constitution, did not contain a disqualification for membership of an Assembly on the ground of dismissal from service. But the disqualifying provision was nevertheless present in another way. The Elective Bodies (Disqualification) Order 1959, promulgated by the President of Pakistan in exercise of his power under ARTICLE 103 2 (e) of the Constitution, provided that, notwithstanding anything contained elsewhere, a person stood disqualified until the 31st day of December 1966 for being a Member or a candidate for membership of an elective body" if he is dismissed, removed or made to retire from the service of the Government or a public statutory corporation on a charge other than that of inefficiency" (44). This piece of legislation was applicable also at the time of 1964-65 Elections, but the Legislature deemed it necessary to incorporate the provision in the Electoral College Act and the National and Provincial Assemblies (Elections) Act. It is wrong to suggest that after the automatic repeal of the Elective Bodies (Disqualifications) Order on 1.1.67, a person dismissed from service became eligible to contest an election. Until the period of five years

44) ART. 5 (a).

contemplated had expired, the disability would continue to subsist.

In some cases the view has been taken that the effect of S.106 of the National and Provincial Assemblies (Elections) Act (45) was to reduce the period of in case of dismissal, which was 31.12.66 under article 5 of the Elective Bodies (Disqualification) Order 1959. It is said that, whereas under the said Order, a person dismissed from Government was disqualified till 31st December 1966, under S.106 of the Act it was limited to a period of five years from his dismissal. It is submitted, with the greatest respect, that the statement is incorrect. At the time when the National and Provincial Assemblies (Elections) Act was promulgated (46) the life of the 1959 Order was only two years and four months. The intent of S.106, therefore, was that the period of disqualification, which was shorter than that considered sufficient for such a person to reform, should be maintained for a minimum of five years from the dismissal. The more appropriate question was which provision laid the greater penalty? Of course, it could not be more than five years, nor is it possible to contend so.

45). which is similar to Electoral College Act S.53 (2)(h).

46). 26th August 1964; the Electoral College Act was published in the official gazette on 18th August 1964.



In some cases a Government servant is first convicted and then dismissed from service, and the question arises as to the point of time the disqualification should be deemed to commence; should it be the date of dismissal or the date of conviction? The answer came in Azizul Hasan v. Returning Officer (47). The appellant in that case was on 23.12.59 convicted and sentenced to seven years rigorous imprisonment under the Central Martial Law Regulation Nos. 30, 5 & 32 by a Special Military Court but on 28.8.60 the unexpired portion of his imprisonment was remitted by the higher authority; he was actually dismissed from service on 2.9.60. At the time of nomination, five years had not elapsed from the date of dismissal but they had from the date of his conviction. It was held that the appellant had been wrongly disqualified by the Returning Officer. Iqbal, J., as Member of the Election Commission, observed that the real test would be the cause of the disqualification. If a conviction is the basis for dismissal, the period of five years is to be reckoned from the Court's Order of conviction. In a case of simple dismissal, it should commence from the date of dismissal irrespective of when it is notified.

47). P.L.D. 1965 E.C. (Journal Section) p.140.

Convicts

A person convicted of an offence involving moral turpitude and sentenced to imprisonment for more than six months or convicted of a corrupt or illegal practice relating to an election is under a disability to contest elections to the Electoral College for a period determined by Government(48) The Act does not define moral turpitude but, generally speaking, anything which is done contrary to principles of morality involves moral turpitude. In other words, it is an act that injures the moral fibre of a person and lowers his moral values. In Saudgar Ali v. Chairman District Council (49) Sajjad Ahmed and Jamil Hussain, J.J., of the West Pakistan High Court approved the following definition:

"anything done contracy to justice, honesty, principle or good morals; an act of baseness (sic), vileness or depravity in the private or social duties which a man owes to his fellowmen or to the society in general; something contracy to the accepted and customary rule of right and duty between man and man ".(50)

But what will amount to moral turpitude will always remain a question of fact to be determined with care and caution. For instance, in the case already cited the petitioner was alleged to have fraudulently obtained the transfer of evacuee land to himself and to have neglected to make the declaration

48). Electoral College Act.S.53 (1)(e)read with S.53 (1)(i).

49). P.L.D.1963 L 601.

50). Ibid at pp 602, 603 referring to Ramanatha Aiyer's Law Lexicon.



required by the law. It was held that, besides violating the law, he was guilty of moral turpitude insofar as he tried to retain his unlawful gain or acquisition.

Clause (1) of S.53 (1) of the Electoral College Act states that a person is disqualified if "he has been convicted of a corrupt or illegal practice relating to"any election". It is submitted that the word "any" is very misleading. Prima facie it would seem that every election, held at any time under this Act or a different law, is included within its ambit. But the word "election" too has been defined in the Act, to mean an election to the Electoral College under the 1964 Act. This means that the expression is confined to elections held under this Act and does not include an election under some other Act (51). A fortiori, only a person convicted of a corrupt or illegal practice, within the meaning of the Electoral College Act 1964, will be disqualified (52). It must, however, be made clear that, if a disqualification of the kind had been incurred under a previous law, the enactment of the Electoral College Act, 1964 cannot have the effect of wiping out the unexpired portion thereof.

51). Electoral College Act. S.2 (6).

52). Ibid S.61 read with ss.62,64 and 65.

53). (next page).

A case before the East Pakistan High Court with the following facts arose. The election of the returned candidate, the petitioner before the court, was held void on the ground that he had failed to submit a return of his election expenses in the first elections held under the 1962 Constitution. The non-submission of election expenses was an illegal practice within the meaning of National and Provincial Assemblies (First Elections) Order, 1962 (but not under the Electoral College Act 1964), punishable with a fine not exceeding Rs.500/- and, if the Election Commission made an order to that effect, a disqualification up to four years could be incurred (53). The petitioner was convicted and fined but he was not disqualified for future elections. It was held that he was not disqualified, because the expressions "illegal practice" and "any election" must only be given the meanings assigned to them under the Electoral College Act (54). It may be emphasised that, had the petitioner been disqualified for future elections for the maximum period of four years, he would have continued to be under a disqualification at the time of 1964 elections to the Electoral College.

With regard to elections to the Assemblies, a person who, within five years of the election, has been sentenced to 53). articles 54, 73(2) read with article 97.  
54). *Saleb Mia v. S.M.Mia*, P.L.D.1966 D.439.



transportation or to imprisonment for more than two years on conviction for an offence, cannot contest (55). Conviction on commission of an electoral offence, whether a sentence of imprisonment is or is not passed, may result in a disqualification which may extend to four years (56). As stated earlier, a law promulgated by the President in 1959 contained a general provision relating to all elective bodies with a view to disqualifying a person from being a member of an elective body on specified grounds (57). Persons convicted on any count and sentenced to imprisonment for more than two years were disqualified for being members or candidates for any elective body until 31st December 1966(58); the Electoral College Act and the National and Provincial Assemblies (Elections) Act specifically provided that such persons would be ineligible (59).

A question could have arisen in the past as to the effect of ~~the provision~~ <sup>article 5</sup> of the Elective Bodies (Disqualification) Order under each of the two Acts. Suffice it to say that the former contained a more comprehensive provision including

55). Constitution of Pakistan (1962) ART.103.

56). National and Provincial Assemblies (Elections) Act S.104.

57). Elective Bodies (Disqualification) Order, 1959.

58). Ibid. ~~art.~~ 5.

59) Electoral College Act. S.53 (1)(h) and National and Provincial Assemblies (Elections) Act. S.102.

all offences for which a sentence of more than two years had been passed, the nature of the offence notwithstanding(60).

The Order expired on 31st December, 1966 but its effect is preserved by an amendment to clause(h) of S.53(1) of the Electoral College Act. Under the new clause a person is disqualified from membership of the Electoral College if, "he has been on conviction for any offence sentenced to transportation or imprisonment for not less than two years or has been sentenced to death and that sentence has been commuted to transportation or imprisonment"(60a).

It is pertinent to observe that the period of imprisonment to which a person is sentenced may subsequently be reduced or remitted. One way in which a sentence may be reduced is upon indulgence shown by an appellate or revisional court. In some cases an appellate court's judgement is that "the conviction is maintained but the sentence already undergone is sufficient to meet the ends of justice". Again executive authorities are empowered to pardon offenders(61). A pardon extinguishes

60). ART.103(2) of the Constitution disqualifies a person from membership of an Assembly if the conviction and sentence was passed within the last five years. S.53(1) of the Electoral College Act disqualified a person convicted of an offence involving moral turpitude and sentenced to six months; by the Electoral College(Second Amendment) Act 17 of 1967, the provision became similar to ART.103(2), except that it does not specify the period during which the conviction and sentence should have taken place.

60a) w.e.f.16.12.67 vide Amending Act 17 of 1967 and footnote 60.

61). As under S.401 of the Code of Criminal Procedure.



conviction and sentence but though remission has the effect of reducing the sentence, it does not affect the conviction; commutation does not affect the conviction but substitutes a sentence of a different kind.

Now "reduction" and "remission", when referring to a sentence of imprisonment or fine, are distinct terms with different legal meanings. In the case of reduction the sentence is curtailed but the conviction remains intact; the order of remission has the effect of releasing the convict for the period for which the sentence is remitted. In certain cases of remission, a condition may be imposed on the convict that if he commits a default of the specified nature, he may be called upon to undergo the remitted portion of the sentence. In other words, remission has a bearing on the execution of the sentence; it absolves the convict of his liability to undergo the full term of imprisonment; but it does not always reduce the sentence. So ~~specifically~~ if by law a Court of Appeal or Court of Revision were specifically given, in addition to the power of acquittal, conviction or reduction of sentence, a power also to remit a sentence, and, in a particular case dealing with appeal or revision, it remits the sentence, its obvious effect will be that the convict will be absolved of his liability to undergo the imprisonment for the period remitted but it will not have affected the sentence.

In Saudagor Ali v. Chairman, District Council (62), the High Court of West Pakistan had occasion to examine this very question. The petitioner was tried under the Martial Law Regulation (No.49) and convicted by a special Military Court to a sentence of five years and a fine of Rs.10,000/-. In confirmation proceedings, on 22.2.62, the sentence was reduced to one year's imprisonment and the fine to Rs 5,000/-. On 3.4.62 the unexpired portion of his sentence was remitted as also the fine. The petitioner thus only suffered forty days imprisonment in all. It was held that the remission had the effect of wiping off the sentence which remained unserved, and the petitioner was not disqualified. Sajjad Ahmed, J., said,

"remission absolves the sentence where the remission is total and where it is partial, to the extent of sentence remitted. In the case of total remission the sentence will be deemed to have never been passed. In a case where the portion of the sentence is remitted, it will be deemed as if the portion thus remitted was never imposed" (63).

This view has not been followed in a recent case, which involved similar facts (64). The appellant was convicted under the Central Martial Regulation (nos.30, 5 and 32) by a Special Military Court on 23.12.59, but on an application made under paragraph 6(5), the unexpired portion of the

62). P.L.D.1963 L 601.

63). Ibid at p.606.

64). Azizul Hasan v. Returning Officer P.L.D.1965 E.C. (Journal Section) 140.



imprisonment was, on 25.8.60, remitted by the Commander-in-Chief, as the Deputy Chief Martial Law Administrator. At the time of his nomination for the Assembly elections, an objection was raised that he suffered from a disqualification on the ground of his conviction. The objection was over-ruled by the Returning Officer, who held that the Order of remission also had the effect of reducing the sentence for a period of less than two years. On appeal, the Election Commission held that, when the Commander-in-Chief remitted the sentence of the appellant, it did not interfere with the order of the Military Court but affected only his liability to undergo the full term of his imprisonment; the order of conviction and sentence stood as it was. Although the matter before Mohammed Iqbal, J., Member Election Commission, related to the provisions of the Martial Law Regulation, whereunder the deputy Chief Martial Law Administrator or a Zonal Martial Law Administrator are not courts, but functionaries vested with special powers, the view was also expressed that a sentence remitted by a court or an executive authority are to be treated on the same footing and a remission by either does not have the effect of reducing the sentence. The view in India is that remission granted to a convict under the Code of Criminal Procedure cannot modify a judicial sentence; the Courts have interpreted "sentence" to mean a sentence that is actually undergone and

Other Disqualifications

not the one which was awarded (65). The following classes of persons are also disqualified from being elected to the Electoral College or an Assembly:

- a) Persons preventively detained for nine months or more until five years have elapsed since the detention order was passed (66). Preventive detention may be ordered on the subjective satisfaction of a designated executive authority that the interest of Pakistan requires it to prevent acts prejudicial to defence, external affairs, security of Pakistan, maintenance of public order or supplies and services essential to the community (67);
- b) Persons who are undischarged insolvents; (68). A person may be adjudicated insolvent if he cannot pay his debts amounting to Rs 500/- or more or has committed acts of insolvency. The creditors cannot proceed against him and he cannot acquire any property. The Court which adjudges a man insolvent can discharge him but will not do so if he cannot pay, As.4 in the Rupee (under the Presidency Towns Insolvency Act 1909) or As.8 in the Rupee (under the Provincial Insolvency Act 1920) and in certain other circumstances; and

65). Klagendra Nath v. Umesh, (1958) 16 E.L.R.007; Ganda v. Sampuran, (1953) 3 E.L.R.17.

66). Electoral College Act, S.53(1)(k)read with S.53(2)(a); National and Provincial Assemblies (Elections)Act, S.10 6 (1)(a);

67). The main Central Statute dealing with the subject is the Security of Pakistan Act 1952.

68). Electoral College Act S53 (1)(a); Constitution of Pakis/  
(1962)ART.103(2)(b). tan



- c) Persons convicted of a corrupt or illegal practice (69), or any offence under the Act (70) or who have been found guilty of corrupt or illegal practice by the Tribunal(71). S.53 (1)(i) of the Electoral College provides that if a person has been convicted of a corrupt or illegal practice he cannot contest an election to the Electoral College unless two years, or a shorter period, prescribed and notified by the Government, has elapsed from the date of the expiration of the sentence or, in the case of a sentence of fine only, from the date of conviction. Under Clause (j) of the same subsection a person against whom a finding of corrupt practice has been recorded incurs a similar disqualification for the period specified by the Central Government in the Official Gazette. S.104 of the National and Provincial Assemblies (Elections) Act is to the following effect -

- The conviction ~~is~~ by a court of law as distinct from an election authority.
- 69). Electoral College Act, S.53 (1)(i);/S.104 of the National and Provincial Assemblies (Elections)Act employs the words "found guilty of the corrupt or illegal practice". The reason being that such a finding can only be given by the Tribunal and not by a Court or for that matter another election authority, such as Member of the Election Commission.
- 70). only in respect of election to the Assemblies (vide S104 of the National and Provincial Assemblies (Elections)Act.
- 71). Electoral College Act,S.53.(i)(j); National and Provincial Assemblies (Elections)Act.S.104 (see footnote 70 above).

"where a person has been convicted for any offence under this Act, or has been found guilty of any corrupt or illegal practice by a Tribunal, he shall, if the Commissioners make an order to that effect, be disqualified, for such period not exceeding four years as may be specified in the order, from being or being elected as a member of an Assembly".

Two points emerge from the provision above quoted:

- a) the imposition of the disqualification lies in the discretion of the Chief Election Commissioner. The conviction or the finding of corrupt or illegal practice (as the case may be) must be endorsed by him or his delegate and
- b) the period of disqualification may extend up to four years.

#### Contractors

The purpose of disqualifying persons who hold contracts with the Government is to prevent a conflict between interest and duty that might otherwise arise. Government contractors may exert undue pressure and undue influence on the Government in obtaining or accepting performance of contracts on terms favourable to themselves, if they are chosen members of an Assembly. This not only reflects unfavourably on a Ministry but also may adversely affect the public exchequer. As in India and England<sup>(71a)</sup>, the Pakistan Representation of the People Act, 1957 contained this disqualification but on 23.12.57 the same was removed with retrospective effect (72).

71(a). See However the House of Commons Disqualification Act, 1957 which has removed the disqualification in England.  
72). By Representation of the People (Repeal) Act, 1957 S.2.



The National and Provincial Assemblies (First Elections) Order 1962 i.e., the law relating to the first elections to Assemblies under the 1962 Constitution, deliberately excluded it from the list of disqualifications.

The absence of such a provision in the present statute, namely the National and Provincial Assemblies (Elections) Act 1964 is to be regretted.

The position with regard to election to the Electoral College is, however, different. The Basic Democracies Order 1959 disqualified a person who had a contract for goods or services with a union council or a town committee (73). The Electoral College Act, 1964 makes a similar provision in the following words:-

"A person shall be disqualified from being or being elected as a member of the Electoral College for any electoral unit if..... he is a party to a contract for work to be done for or goods to be supplied to a union council or a town committee within whose jurisdiction such electoral unit is situated or has otherwise any pecuniary interest in such council or committee". (74)

The contracts, in order that they may come within the mischief of this clause, must be confined to a union council or a town or union committee (75), within the territorial jurisdiction of the electoral unit for which election is being sought.

73). Second Schedule Part II para 2(e).

74). Electoral College Act, S.53 (1) (f).

75). SEE OVERLEAF

Thus work done for another local body will not disqualify. Again, the disqualification applies

- a) if the prospective candidate is a party to a contract for work to be done or goods to be supplied to a union council or a town committee within whose jurisdiction the electoral unit is situate,
- b) if he has any pecuniary interest in such council or committee. "Pecuniary interest", whether small or insignificant, and whether or not the prospective candidate is a party to the contract will result in a disqualification. (76). The words used in the clause are of a wide impact and include not only contracts with a town committee but also contracts for work to be done for the committee, irrespective

75). a union council, a town committee and a union committee are the local council's Constituted under the Basic Democracies Order, 1959. In the rural areas a number of villages are grouped together to constitute a union for a population of ten thousand people; each union has a council which serves as a base on which the super-structure of basic democracies rests. There are 7241 union councils (4053 in E.Pakistan and 3188 in W.Pakistan). Town committees are set up for small towns having a population of less than 14,000 persons. They are substantive bodies and all necessary powers of local government rest in them. There are altogether 223 such committees. 28 in E.Pakistan and 195 in W.Pakistan. Cities with population exceeding 14,000 persons are divided into unions called union ~~xxxxxxwithxxpopulation~~ committees. They are auxiliary bodies and alongwith ~~xx~~ union councils and town committees form the basic tier of Basic Democracies in Pakistan (vide Afzal Mahmood: Basic Democracies (1964 ed) p.28.

76). Md. Hasan v. Election Tribunal, P.L.D.1966 K. 348.



of the agency which is to execute the work or lets out the contract (77). It follows that even an indirect interest in a contract of the kind specified, will bring the prospective candidate within the mischief of the provision of law.

A contract for the supply of goods is not synonymous with the supply of goods. The former is merely an agreement to sell; the latter a completed sale. Contract includes, inter alia, a proposal, acceptance of that proposal, free consent and a lawful consideration (78). Merely because a person's name is on the list of the contractors, is no disqualification. In every case the nature of the agreement between the parties must necessarily be looked into, and its terms strictly construed (79).

It is very essential that the contract should be of an abiding and subsisting character. In Chaturbhuj v. Moreswar (80) the goods had been supplied and the only thing that remained was recovery of outstanding dues from the Government. The question was whether a contract terminates when the goods are supplied or does it continue in being till payment is made. It was held that it continues in being till it is fully discharged by performance on both sides. It is

77). Karam Dad v. Md. Yaqub, P.L.D.1965 L 622.

78). Contract Act, 1872, S.2.

79). Karam Dad v. Md. Yaqub P.L.D.1965 L. 622; Md.Hasan v. Election Tribunal P.L.D.1966 K. 348; Abdul Ghafur v. Nur Md. P.L.D.1966 L.423.

80). SEE OVERLEAF.

submitted that this view is not acceptable. Having fulfilled his part of the contract, a person merely becomes a creditor of the Government, whose only right is to recover the money payable under the contract. It would be wrong to suggest that a mere delay<sup>in</sup> making payment on the part of Government should have the effect of disqualifying him as a candidate. It cannot be the intention of the Legislature that the subsidiary<sup>ia</sup> relation of a debtor and creditor should itself operate as a disqualification. Otherwise an omission on the part of the Government to pay even a small amount in some case, a trifling balance to a contractor, who had completely fulfilled his contract would create disability.

In Royce v. Birley (81), a contract was entered into in June 1868 for the supply of goods for the public service of India. The contract was completely executed by the contractors by delivery and acceptance of the goods by 23rd October 1868; but the contractors did not receive payment from the India Office until 18th January. In the interval, 18th November, one of the partners of the firm of contractors was elected as a member of the House of Commons. The delivery

80). (1954) 9 E.L.R.301, based on S.7 (d) of Indian (Representation) Act. 1951 which disqualifies a person "if there subsists a contract entered into the course of his trade or business by him with the appropriate Government for the supply of goods to, or for the execution of any works undertaken by that Government"

81). (1869) 4 L.R.C.P 296.



of goods was completed before the day of election but the price was not paid until after that date. It was held,

"at the time of the election the contract was no longer executory, and nothing remained to be done upon it but for the government to pay the price of the goods. The legislature intended it to apply only to contracts of a continuing nature, such as contracts for the building of works, and contracts for a single supply of goods, though I do not say that a contract for a single supply of goods is within the terms which are used. But to my mind it very plainly appears that the statute did not mean to disqualify a contract, unless the contract was in the executory state on his part, that is to say something remained to be done by him". (82)

Pakistan Courts are neither bound by decisions of an English or an Indian Court. But until a Superior Court take an independent view, it is suggested that the view taken by the English Courts seems to be logical, and also in keeping with the provision in the (Pakistan) Electoral College Act, 1964.

- 82). Under S.1 of the House of Commons (Disqualification) Act 1872, a person who contracts for the public service, or knowingly and willingly furnishes in pursuance of such contract any wares, to be used in the public service, is incapable of being elected or sitting as a member of the House of Commons while he holds the contract. *This Act has been repealed by the House of Commons Disqualification Act, 1957 (vide 4th Schedule). The Act of 1957 has removed the disqualification.*

THE LAW OF NOMINATION

The procedure for nomination is in itself a simple matter but careful regulation of the formalities is required to prevent controversy about nominations alleged to be invalid. The law must provide for notice of the time and place for nominations. The number of nominators, authentication of nominators, verification of the candidates' qualifications, payment of deposit and the making of necessary declarations by the candidate. Although strict observance of the procedure should be required, a nomination paper should not be rejected for a defect or misdescription which is not of a substantial character or upon grounds which are frivolous. It is proposed to deal separately with nominations under the Electoral College Act, 1964 and the National and Provincial Assemblies (Elections) Act, 1964.

Nomination for Election to the Electoral College

Section 21(1) of the Electoral College Act reads thus:

"any voter of an electoral unit may for the purpose of election as a member of the Electoral College from that unit, propose or second the name of any person who is duly qualified as such member."

Only a "voter" may propose or second the name of a candidate for a person who cannot vote should not be permitted to nominate. The voter has to decide for whom he must vote and a person nominated is declared elected if no other candidate is nominated. It has been held that the phrase "duly qualified" has reference to ARTICLE 158(1) of the Constitution



which provides that a member of the Electoral College should be enrolled on the electoral roll and have attained 25 years of age (83). But, the term should further be construed as meaning that such a person is not subject to any of the disqualification mentioned earlier.

The nomination paper must be signed by the proposer, the seconder and the candidate himself. The candidate's consent is essential and he must also certify that he is not under any disability (84). Unless a deposit of Rs 50/- is made, the nomination is liable to rejection (85).

Although a person may be nominated on more than one nomination paper in the same electoral unit (86), a voter cannot subscribe to more than one such nomination paper; if he does, his signatures will be operative only in the case of the

83). Md. Tufail v. Md. Salim, P.L.D.1967 K.104;  
Manzur Aleem v. Zahoor Hussain, P.L.D.1965 L.262.

84). Electoral College Act, S 21 (2).

85). Ibid, S.22 read with S.23 (2)(c).

86). The law does not place any limit on the number of nomination papers that can be filed in favour of a single candidate. The object appears to be twofold:  
a) it helps to ascertain the strength of a particular candidate and b) it ensures that the nomination of a candidate is not rejected on the basis of one or more of his nomination papers being declared invalid. The Election Commission in its report has pointed out that in 1965 for a seat to the Provincial Assembly as many as 70 nomination papers were filed in respect of one candidate although, in its opinion, a maximum of 10 nomination papers should normally suffice. Report on General Elections in Pakistan 1964-65 Vol.1. p.20.

first (87). A candidate may bring his proposer, seconder and one other person to the scrutiny and any of them may object to any other nomination paper. The Returning Officer must give them reasonable opportunity to substantiate any objections that may be raised (88). A defect, which is not of a substantial nature, will be allowed to be remedied but if a candidate is not qualified to be a member of the Electoral College, or the signatures of the proposer or seconder are doubtful or either of them is not qualified to subscribe to the nomination paper, the nomination paper must be rejected (89). The law requires that the Returning Officer must endorse on each nomination paper his decision giving brief reasons for accepting or rejecting it, and finally he must publish a list of candidates who have been validly nominated (90).

The question whether a person possesses the requisite qualifications for election can be gone into at the time of scrutiny has caused some concern to the Pakistan Courts. It arises out of the third proviso to S.23 (3) of the Electoral College Act and the different interpretations to which it may be open to. The proviso is couched in the following words:

- 87). Electoral College Act, S.21(4); <sup>Ghulam Ali v. Shafqat Ali, P.S.D. 1966 L.1028.</sup> ~~Article 100, Constitution of Pakistan~~
- 88). Electoral College Act, S.23 (1) & (2).
- 89). Ibid, S.23 (3).
- 90). Ibid, S.23 (4) read with S.24.



"the Returning Officer shall not enquire into the correctness or validity of any entry in the electoral roll".

It has been contended that neither the Returning Officer nor an election tribunal has jurisdiction to go behind the entries on an electoral roll; if a person is shown as 25 years of age on it, he is qualified, notwithstanding the strong objection that he in fact is below that age. On the other hand, it has been maintained that it is incumbent on them to see that a candidate is of qualified age and the finality which attaches to an entry in the electoral roll should be confined to the right to vote. Those who advocate the first view base their case on a literal interpretation of the above provision, which, according to them, is quite unambiguous and ought to be given effect to; those in favour of the second largely rely on ART.158 (1) of the Constitution, under which the minimum age of a candidate for the Electoral College is prescribed as twenty five years.

The power of the Returning Officer may be considered first. In Khan Faraz v. Md. Iqbal (91), the nomination of the petitioner was sought to be challenged on the ground that, as he was shown as only 21 years on the electoral roll, he was ~~disqualified~~ disqualified since the entry of his age was clothed with finality. In reply it was contended that a (91). P.L.D. 1967 Pesh.41.



that a Returning Officer was under a constitutional obligation to enquire whether a particular candidate possesses the requisite qualification for being an elector and on entry in the electoral roll regarding the age of a candidate could not supersede the constitutional provision. It was held that,

"Since ART.158 of the Constitution disqualifies an elector from contesting election, if he is not 25 years of age, it is rendered obligatory on the Returning Officer to embark upon summary enquiry in regard to the constitutional qualification of an elector regarding the age and he is under a constitutional duty to reject the nomination paper, if the elector is below 25 years of age and the entries in regard to age are not in the least conclusive or binding on the Returning Officer... Section 23 (3) proviso (iii). ... is controlled by ART. 158 and not vice versa".  
(91a)

According to the court, ~~unless~~ the proviso was interpreted in that manner, very extraordinary results could ensue. For example, a minor might be entered as being 25 years of age and vice versa, and in such a case the constitutional provision in regard to the requisite qualifications would be by-passed. The High Court of West Pakistan constituted a full Bench, consisting of three senior judges, ~~xxx~~ to examine this question (92). In this case, both petitioner and respondent contested elections to the Electoral College. The former objected to the latter's nomination on the ground that he was below 25 years of age, being shown as 23 years on the electoral roll.

91a). *Ibid.* at p. 43.

92). *Md. Jufail v. Md. Salim*. P.L.D.1967 K, 104.

The respondent produced counter affidavits to disprove what was stated by the petitioner, and further produced a certificate of age from the police surgeon that he was well above the qualified age. The Returning Officer, who scrutinized the objections, rejected the objection; at the election the respondent was declared elected. To support the contention that finality is attached to an entry about a candidate's age, it was, inter alia, contended that there is no other machinery provided by the Constitution to ascertain the age of an intending candidate except ART. 158, which leaves no doubt that the election of members of the Electoral College of Pakistan is to be "in accordance with law" and the relevant law is S.23 of the Electoral College Act, which specifically forbids the Returning Officer to enquire into the correctness or validity of any entry appearing on the electoral roll; it is therefore clear that the finality attaching to entries on the electoral roll will extend to the qualifying age for election to the Electoral College as well. Anwarul Haq, J. (with whom Waheedudin J. concurred), said:-

"the injunction contained in the proviso cannot be interpreted in a manner which would confer a status and finality on the electoral roll which it was not intended to possess by these provisions of the Act and the Rules under which it has been prepared. The finality which therefore attaches to the electoral roll and the restraint which is placed on the Returning Officer under the third proviso of section 23 of the Electoral College Act must be interpreted to mean that the Returning Officer shall not question the

"right of vote" of either the "candidate" or the proposer or seconder, while scrutinising a nomination paper. If an objection is raised regarding the fulfilment by a candidate of the requirement of age as prescribed by clause (1) of Article 158, it is incumbent upon the Returning Officer to satisfy himself that the requirement is, in fact, fulfilled, and he can in doing so go behind the entries of age in the electoral roll." (93)

The decision is in consonance with the decisions (94) that the finalisation and revision of the electoral roll is directed towards the sole question of a person's qualification as a voter (95).

In Ghulam Abbas v. Additional Commissioner (96) and Ahsan Ali v. Z.A. Chaudhury (97), it was held that even an election tribunal is precluded from going into the question of age of a candidate. The decision in both cases did not deal thoroughly with the question and were disapproved in the subsequent cases (98).

A rational view would be that, although the Returning Officer may be considered as incompetent to question the

93). Md. Tufail v. Md. Salim, P.L.D. 1967 K.104 at p. 119.

94). Imtiaz Ahmed v. Ghulam Md., P.L.D. 1958 S.C. 238; Mehboob v. Controlling Authority, P.L.D. 1961 B.J. 15; Ahmed v. Mir Md., P.L.D. 1966 L. 927; Ghulam Qadir v. Ahmed Shafi, P.L.D. 1967 L. 68; Allah Ditta v. Md. Munir, P.L.D. 1966 L. 770; Neasuruddin v. A.R. Khan, P.L.D. 1966 D. 617. These cases have been discussed in Chapter 3 under Finality of electoral rolls.

95). And the recent decision of the Lahore High Court in Md. Yusuf v. <sup>Karim</sup> Returning Officer, P.L.D. 1968 L. 30.

96). P.L.D. 1965 K. 625.

97). P.L.D. 1966 D. 41.

98). See Overleaf



entries of age in the electoral roll, due to the third proviso to S. 23 (3), the powers of an election tribunal, in this regard, remain unfettered. A perusal of ART. 171 (1) of the Constitution shows that, with regard to election disputes, the ultimate forum is the election tribunal. A dispute relating to the age of a candidate being essentially an "election dispute", it will be unreasonable to hold that such a dispute is excluded from the jurisdiction of an election tribunal, whereas all other sorts of election disputes are within its domain. There is certainly no reason why the two should be placed on a different footing (99).

A High Court also, in the exercise of its jurisdiction under ART 98 (commonly referred to as the writ jurisdiction), has power to make the necessary order in a case where a person is not qualified to hold a public office and a person who does not possess the basic qualification under the constitution to be elected as a member of the Electoral College cannot be allowed to function in view of the mandate of the Constitution (1).

98). Abdur Rashid v. Khawja Mahmood, P.L.D. 1966 L. 216; Ahmed v. Mir Md. P.L.D. 1966 L. 927, Abdul Ghafur v. Nur Md., P.L.D. 1966 L. 423; Gazi v A.R.Khan P.L.D. 1966 D. 617.

99) read with S. 60 (2) of the Electoral College Act and r. 36 (1-A) of the Electoral College Rules, 1964.

1). Allah Ditta v. Md. Munir, P.L.D. 1966 L. 770.

A candidate whose nomination paper has been rejected may prefer an appeal to the Officer, specified in this behalf by the Chief Election Commissioner (2). The right of appeal may be exercised before the election and the right to file an election petition can be exercised after it. If no authority within the terms of S.23 (5) is specified, an election petition will lie and it is obviously desirable that it should be decided before the poll. Failure to appeal is no bar to filing an election petition (3). The appeal, which must be accompanied by a deposit of Rs.50/- towards costs, is to be filed within three days of the rejection of nomination. The powers of the appellate authority are expressed in general terms. According to r 27 (8), an appeal shall be disposed of either summarily or after such summary enquiry as may be considered necessary; the decision as to when an appeal should be heard summarily is left to the discretion of the authority. Two cases in which it might be done are (a) when the appeal is out of time, (b) when the deposit of security is not made. There is, however, no specific provision to the effect that failure to file the appeal in time or deposit security will entail dismissal of an appeal. An examination of r 27 (1), on the other hand, shows that it is not imperative to file the appeal within the period of limitation: cases of election petitions filed under the Act confirm the view.

2). Electoral College Act, S.23 (5) read with Electoral College Rules, r.27.

3). Khan Faraz v. Md. Iqbal, P.L.D.1967 P.1



Although the improper acceptance or rejection of a nomination paper is considered as a grave irregularity, an appeal is only provided in the case of the latter (4). The Returning Officer's order accepting a nomination would thus appear to be final. But there seems to be no bar to such an order being subsequently attacked before the Election Tribunal, which can declare void the election of a candidate on the ground that there has been a contravention of the provisions of the Act. In Karam Dad v. Md. Yaqub (5) it was contended that the omission to provide a remedy for improper acceptance was a clear indication of the intent of the Legislature that the acceptance of a nomination paper be final and that it could not be called a question before an Election Tribunal. But, the contention was repelled by the Court for it held:-

4). In this respect the Election Commission remarked: "The law did not provide for an appeal against the acceptance of a nomination although a wrongly accepted nomination could form the subject matter of an election petition. It has been felt that there should be a provision for review against acceptance of nominations, and this power of review should be exercisable by the Commission if a malafide acceptance of nomination is brought to its notice by the Chairman or a Member of the Commission". (Report on General Elections in Pakistan 1964-65 Vol.1 p.158).

5). P.L.D.1965 L. 622.



"in view of the clear and unambiguous language employed in subsection (2) of section 60 and sub-rule (1) of rule 36, any limitation on the power of the Tribunal in this behalf will have to be expressed in clear terms in the relevant statute and cannot be left to be inferred only indirectly from certain omissions in another part of the Act dealing with an antecedent stage in the entire process of elections to the Electoral College "(6).

After the list of the contesting candidates has been published, a candidate may withdraw on or before the day fixed for withdrawal. It must be done by notice in writing and delivered to the Returning Officer either personally or through an authorised agent (7). If the Returning Officer is satisfied that the signatures are genuine, he will publish it in the prescribed manner (8). A new list of contesting candidates is then prepared (9). A notice of withdrawal is irrevocable (10); so the candidate must already have made up his mind before its delivery to the Returning Officer.

Similarly, a candidate may retire from the election but only within the seven days before the poll (11). This has been held to be imperative (12) but it is laid down in S.36 that a candidate who fails to bring his ballot box before the poll may be considered as having retired from the contest (13),

- 6). Karam Dad v. Md.Yaqub, P.L.D.1965 L. 622 at p1625.
- 7). Electoral College Act, S.25 (1).
- 8). Ibid, S.25 (3).
- 9). Ibid, S. 25 (4).
- 10). Electoral College Act, S.25 (2).
- 11). Ibid, S. 26 (1).
- 12). Md. Afzal v. Miraj Din, P.L.D.1966 L. 689.
- 13). read with S.37 of the Act; and Sher Md.v.Deputy Commiss. P.L.D.1966 P. 154, where it has been held that retirement in such cases is automatic and does not require a notification to that effect.

which would suggest that it is merely directory. It is submitted that retirement may be effected at any time before the poll. Once given, a notice of retirement is also irrevocable.

Nomination for Election to Assemblies:

An elector, whose name appears on the electoral roll and is not disqualified by the Constitution, the National and Provincial Assemblies (Elections) Act or any other law, may propose or second the name of a person, of 25 years of age, to be a candidate for a seat in an Assembly. The nomination paper must contain a declaration by the candidate that he has consented to the nomination, that he is not under any kind of disability and, if elected, he will uphold the sovereignty and integrity of Pakistan and always bear true faith and allegiance to its Constitution (14).

- 14). Although ART.105 of the Constitution provides that a person shall not, at the same time, be a candidate for election to more than one seat in an Assembly or to a seat in one Assembly and to a seat in another Assembly, the filing of nomination papers in more than one constituency, in respect of a particular candidate, is not specifically prohibited. The Election Commission reports that during the 1965 elections two persons filed their nominations from two different Central Constituencies in W.Pakistan. In one case, both the nominations were accepted but he later withdrew one of them. In the second case, the Returning Officer himself knowing that a person was a candidate in another constituency in which his nomination papers had been accepted, rejected that person's nomination in his constituency. The Commission remarks that as the intention of the Legislature is only to prevent double candidature in cases where a candidate is filing nomination papers in more than one constituency he should be required to intimate this fact in the form of declaration to the Returning Officers of all constituencies where his nominations are filed. (Report on General Elections in Pakistan 1964-65 Vol.1 pp 30, 31 & 158).



There is no limit to the number of nomination papers that can be filed for one particular candidate in the same constituency. But an elector should not subscribe to more than one such paper, because the first in time only will be treated as valid. The deposit required of a candidate for election to an Assembly is higher than that required for election to the Electoral College. It is Rs.1,000/- for a seat in the National Assembly and half as much for seat in a Provincial Assembly (15).

The nomination papers are scrutinized by the Returning Officer (16). The candidates, their agents, proposers and seconders may attend and raise objections (17) without taking into account defects, which are not of a substantial nature, if it appears that a candidate, proposer or seconder is not qualified or the procedure for filing of nomination has not been complied with or the signatures of a <sup>proposer</sup> ~~proposer~~ or seconder are not genuine, the Returning Officer will reject the nomination paper (18). It is noteworthy that the signature of the candidate is to be accepted at its face value (19). The reason appears to be that in his case the signature is appended to a declaration of assent and oath on solemn

15). National and Provincial Assemblies (Election) Act. S.13.

16). Ibid, S. 14.

17). Ibid, S.14 (1) and (2).

18). Ibid, S.14 (3) read with SS 12 and 13.

19). Ahmed Saeed v. Md.Nawaz, P.L.D.1966 L. 88.

affirmation; any untrue statement is made at his own risk and may involve a heavy penalty. The rejection of a nomination paper has no effect if the candidate is validly nominated on another nomination paper, though this may create difficulties. For instance, in a given case it might be difficult to say which nomination paper was received first.

As in the Electoral College Act, it is stated in the National and Provincial Assemblies (Elections) Act that a Returning Officer must not enquire into the correctness or validity of an entry in the electoral roll, prepared under the Electoral College Act (20). The question, whether a Returning Officer must determine the true age of a candidate, if an objection is raised thereto, once again arises. The position may be expressed thus. Whereas the qualifying age of a candidate for the Electoral College is stated in the Constitution and, on that basis, it is possible to contend that it is the duty of the Returning Officer to see whether the constitutional qualification has been fulfilled, it is not so in the case of candidature for elections to the Assemblies. But the answer seems to lie in S.12 and S 14 when read together. Under subsection (3) of S.14 a Returning Officer must reject a nomination paper, if he is satisfied that a candidate is not 20). National and Provincial Assemblies (Elections) Act, S.14 (3) proviso (iii).



qualified to fill the seat for which he has been nominated. This clearly means that the nomination of a person, who is less than 25 years - which is an essential qualification to become a candidate (21) cannot be accepted. Even if the Electoral Roll describes a person as being of full age, that entry will not be sacrosanct and the Returning Officer must hold an independent enquiry. It is submitted that this intention is further manifest in clause (c) of subsection 3 of S.14, which, inter alia, says that if "any provision of section 12" is not complied with, the nomination paper must necessarily be rejected. Now, it is one of the requirements of that section that a candidate must be 25 years of age. Is it then possible to contend that the Returning Officer should treat the age shown in the electoral roll as final? The answer must be in the negative. But it may further be asked why incorporate the provision in section 14? It is submitted that it is there for a limited purpose, namely that the right of a candidate or a proposer or a seconder to be on the electoral roll will not be allowed to be raised; to this extent the jurisdiction of the Returning Officer is barred. A tribunal, constituted under the act, can set aside the election of a returned candidate on the ground that his nomination is invalid or that he did not qualify, or was 21). as held in *Md.Tufail v. Md.Salim*, P.L.D.1967 K.104.

subject to a disqualification, on the nomination day (22). So even assuming that there can be an ouster of jurisdiction of a Returning Officer to go behind entries in the electoral roll, it cannot be inferred in the case of an Election Tribunal

The Returning Officer must endorse his decision on each nomination paper; in the case of an order of rejection, it is essential to give reasons therefore (23). An appeal lies to the Member of the Election Commission within five days of the order rejecting a nomination paper (24). The appeal must set forth, in the form of a memorandum, the precise reasons for making it, and should be accompanied by a deposit of Rs 200/- (25). A summary enquiry only will be held and, if the appellant is successful, his name will be entered in the list of the validly nominated candidates (26). A finding that the appeal was vexatious or frivolous renders the whole or part of the deposit liable to forfeiture (27). It may be mentioned that though no appeal has been provided against an order accepting a nomination, an election petition would be competent (28). If an Election Tribunal has been appointed the petition lies to it; otherwise it must be presented to the Chief Election Commissioner, who will take measures to have it decided as expeditiously as possible. An express provision that all disputes with regard to nominations be settled before the poll seems necessary.

22). National and Provincial Assemblies (Elections) Act, S.72(1)(a) and (b).

23). Ibid, S.14 (4). 24). Ibid, S.14 (5) read with National & Provincial Assemblies (Elections) Rules, r 5(1).

25). Nat. & Prov. Ass. (Elections) Rules r. 5(5) & (3). 26 to 28) See Overleaf



The law permits the validly nominated candidates to deliver to the Returning Officer a notice in writing, duly signed by them, before the day fixed, indicating their intention to withdraw from the contest (29). The notice can be served in person or through an agent authorised on his behalf, and is irrevocable (30), if the Returning Officer is satisfied that the signatures are those of the candidates proposing to withdraw their candidatures (31). Notices of such withdrawals are affixed on his notice board (32). Although the law is silent about the reason for this, it is possibly done for the purpose of inviting objections, especially because a notice of withdrawal is not open to cancellation. A list of contesting candidates is then drawn up afresh in the same manner as the list of validly nominated candidates, prepared after scrutiny (33). It may be observed that the time on the day specified for withdrawals on which a candidate may withdraw will, of course, vary from constituency to constituency.

26). Ibid, r 5 (7) and (8).

27). Ibid, r 5 (9).

28). See observation of the Election Commission (footnote 4).

29). National and Provincial Assemblies (Elections )Act S.16.

30). Ibid, S.16 (1) and (2).

31). Ibid, S 16 (3).

32). Ibid, S. 16 (4).

33). Ibid, S.17.

A candidate may, similarly, retire from the contest on a day "not later than seven days before the poll".~~xx~~ It has been held that seven clear days should intervene between the date of retirement and the date of the poll (34). In the case where it was so held, nine persons, including the petitioner and respondent, filed nominations for elections to the Provincial Assembly of West Pakistan on 10th April 1965. According to published time table for the election (35), the scrutiny of nomination papers was on 11th April, the last date for withdrawal was 19th April and the polling was fixed for 16th May. The Petitioner and another candidate withdrew, leaving seven persons in the field. Three others presented their application, for retirement on 9th May. Notices were published on the same day and they ceased to be contesting candidates Under S. 17 (4). In the end, the respondent was left as the only contesting candidate and was elected unopposed (36). It was contended that the Returning Officer had misinterpreted the provisions of Subsection (1) of S.17 of the National and Provincial Assemblies (Elections) Act because seven clear days had not elapsed between the date of their retirement and the poll and the respondent could not be declared as

34). Md. Afzal v. Miraj Din, P.L.D. 1967 L.689.

35). under S.11 of the National and Provincial Assemblies (Elections) Act.

36). under S.20 of the National and Provincial Assemblies (Elections) Act.



elected unopposed because the petitioner's retirement was invalid.

In the case of death of a contesting candidate before the close of the poll, the entire proceedings relating to the election are terminated. There must be a fresh election (37).'

#### Nomination to the Reserved Seats

Concerning nominations for the "reserved seats", under ARTICLE 169 of the Constitution, any person whose name appears on a list of electors for a zone may nominate and any other such person may second the name of a woman, qualified to be a member of the Assembly, to represent that zone. As in the case of nomination to the general seats, every nomination must be by a separate nomination paper and the requirements with regard to the certificate by the proposer and the declaration and the oath or affirmation by the person nominated have to be complied with. A nomination paper, for a reserved seat in the National Assembly must be accompanied by an extract from the electoral roll for any electoral unit, wherein the candidate's name is entered as a voter; in the case of such a seat in the Provincial Assembly a similar extract from the electoral roll for an electoral unit in the Province is essential (38).

- 37). National and Provincial Assemblies (Elections) Act, S.18.
- 38). Paragraph 4 of the Directions for Elections to the Seats Reserved Exclusively for Women, issued by the Election Commission under S.45 of the National and Provincial Assemblies (Elections) Act. (The Provincial Assembly of West Pakistan Manual (2nd ed.) p.382.

The provisions in the National and Provincial Assemblies (Elections) Act with regard to nominations for the general seats, such as, deposit, scrutiny, withdrawal and uncontested elections also apply to reserved seats.

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Elections must be held in an atmosphere of complete freedom and with absolute fairness and impartiality. An honest and independent election staff, maintenance of law and order at the polls and the observance of secrecy of the ballot constitute important factors in this regard. ARTICLE 153 of the Pakistan Constitution provides for arrangements to be made "to ensure that the election is conducted honestly, justly, fairly and in accordance with the law and that corrupt practices are guarded against." This chapter is, therefore, devoted to the study of the procedure for election of members of the Electoral College and the Assemblies in Pakistan (1). Where a provision is common to the Electoral College Act and the National and Provincial Assemblies (Elections) Act, they will be dealt together and cases decided under one may advantageously be used for purposes of the other. Any points of distinction will, however, be specifically brought out.

#### The Chief Election Commissioner

The head of the election organisation is the Chief Election Commissioner. He is appointed by the President (2),

1. The law concerning the election of the President is not discussed here but will be extensively dealt with in the next chapter, namely, Chapter 6.
2. Constitution of Pakistan (1962), ART.147.



although what qualifications he should possess, prior to his appointment, are not stated. ARTICLE 149 of the Constitution entitles him to the same salary and allowances as a Judge of the Supreme Court (3) but his other terms and conditions of service are left to be determined by an Act of the Central Legislature or, until so determined, by the President. ARTICLE 152, however, provides that should the office of the Chief Election Commissioner fall vacant, whether permanently or temporarily, a Judge of the Supreme Court, to be nominated by the Chief Justice, will act as the Chief Election Commissioner. Again, the manner of removal from office is that contemplated by the Constitution for the removal of a Superior Court Judge (4). From this it may safely be inferred that the terms and conditions of service of the Chief Election Commissioner are similar to those of a Judge. It is needless to mention that he must be a person of highest calibre and his conduct impeccable.

Before assumption of office, any other office of profit must be vacated and an oath taken before the Chief Justice of Pakistan that he will discharge his duties and perform his functions to the best of his ability, faithfully in accordance with the Constitution and, without fear or favour, affection or ill-will, at no time allowing his personal interest to influence

3. The salary is Rs.5,100/- (approximately £475) p.m, vide the Second Schedule enacted under ART.124 of the Constitution

4. ART.150 read with ART.128.

his official conduct or decision (5). The appointment is for a period of three years unless the Chief Election Commissioner sooner resigns, by notice in writing to the President (6). The same person can be reappointed but the President must obtain the concurrence of the National Assembly; this can only be done before the expiry of two years from the date of completion of the first term (7). The reason for the last proviso is that a person who has held office as Chief Election Commissioner may not hold another office of profit in the service of Pakistan for two years after he ceased to hold that office (8).

Since it is the responsibility of the Chief Election Commissioner to ensure free and fair elections, the Constitution requires all executive authorities in Pakistan to assist him achieve this (9). The rules for carrying out the purposes of the Electoral College Act and the National and Provincial Assemblies (Elections) Act can only be made after consultation with him (10).

5. Ibid, ART.148 read with the First Schedule.
6. Ibid, ART. 150 (1) and (4).
7. Ibid, ART. 151 (3).
8. ART.151 (1): the provision is noticeably identical with that concerning a Judge of the Supreme Court or a High Court under ART.126 (2).
9. Constitution of Pakistan (1962) ART.163.
10. Electoral College Act, S.86; National and Provincial Assemblies (Elections) Act, S.14 (being a member (Chairman) of the Election Commission, he could be delegated powers of the Commission in this regard).

Under S.82 of the Electoral College Act, the Chief Election Commissioner may issue such instructions and exercise such powers, including the power to review an order passed by an officer empowered under the Act, and may make such consequential orders as, in his opinion, are necessary for ensuring that an election is conducted honestly, justly and fairly, and in accordance with the law; S.109 of the National and Provincial Assemblies (Elections) Act is also to the same effect. Where the statutes make provisions for anything to be done, but no provision or no sufficient provision exists therefor, it may be done by an Authority and in a manner specified by him (11). With regard to elections to the Assemblies, the Chief Election Commissioner may even exercise the powers of any authority, except the Election Tribunal or the Election Commission exercising judicial functions (12). The discretion of the Chief Election Commissioner is assured in that no proceeding, whether civil or criminal, will lie in respect of anything done by him in good faith under the Act or any rule or order made or any direction given thereunder (13). What has been said above applies also to a delegate of the Chief Election Commissioner.

11. Electoral College Act, S.87; National and Provincial Ass. (Elections) Act, S.115.
12. National and Provincial Assemblies (Elections) Act, S.108.
13. Electoral College Act, S.85; National and Provincial Assemblies (Elections) Act, S.113.

The power to remove him vests in the President but the following procedure is required to be observed (14). When information is received that the Chief Election Commissioner has become incapable of properly exercising his duties, due to physical or mental incapacity, or is guilty of gross misconduct, the President may refer the matter to the Supreme Judicial Council of Pakistan, constituted under ARTICLE 128 of the Constitution, to enquire into the conduct of Judges. If the allegations are found to be true by the Council, it will recommend to the President the removal of the Chief Election Commissioner. But the ultimate decision rests with the President himself; he is not bound to accept the recommendation. Under ARTICLE 128 (5) of the Constitution, information from any source is considered sufficient ground to initiate proceedings against the Chief Election Commissioner; this might lead to a number of frivolous and vexatious applications which cannot be discouraged by an award of special costs. It is submitted that a person who has a complaint against the learned officer should be required to bring it to the notice of the Supreme Judicial Council, or another body specially constituted for the purpose, to decide whether there is, prima facie, substance in the allegations, before the complaint is admitted for hearing. The Council, either of its own finding or on the matter being reported to it, should then hold a formal enquiry; if

14. Constitution of Pakistan (1962), ART.150 (2) read with ART.128.

necessary the formal sanction of the President should be obtained; it should, after hearing the complaint, send its recommendations to the President, whose confirmation should be essential.

It may be mentioned that the powers of the Chief Election Commissioner may be delegated by him to a subordinate officer or authority (15). Powers concerning appointment of officers and arrangements for conducting elections to the Electoral College, under the undermentioned sections (16), were delegated to the Provincial Election Authority, constituted in pursuance of S.3 of the Electoral College Act.

#### The Election Commission

For elections to the Assemblies, the President and referenda, an Election Commission is appointed (17). The Chief Election Commissioner acts as its Chairman; the other two members are Judges of the High Court, one from each High Court, appointed by the President after consultation with the Chief Justice of the Provincial High Court to which each Judge belongs (18). It is submitted that, to secure a complete

15. Electoral College Act, S.83 and Electoral College Rules, r.38; National and Provincial Assemblies (Elections) Act, S.111.
16. Electoral College Act, SS.5,6,7 (1) & (2), 8,15,16,19, 22,23 (5),28,30,33,34,36,38,48,52,53,54,55,59,80,82.
17. Constitution of Pakistan (1962), ART.153 (1).
18. Ibid, ART.153 (2).



independence for this important body, the two members should preferably be appointed by the Chief Election Commissioner himself and not the President (19). Of course, the consent of the Chief Justice will be necessary for administrative reasons, for it might be that the services of a particular Judge could not be dispensed with for the relevant period.

The Commission can delegate its powers but only to its Chairman or members; the delegated authority may be for the exercise and performance of all or any of its powers and functions (20). The legality of the actions of the Commission and its delegates, in respect of things done in good faith, cannot be called in question (21). The object of these provisions is to enable the holding of free elections or referenda, as the case may be.

#### The Returning Officer.

The person ~~may~~ more directly concerned with the conduct and supervision of elections in Pakistan is the Returning Officer.

19. It will be seen in the eighth chapter, dealing with election disputes that the Election Commission or rather one of its members, sits in appeal in disputes, inter alia, relating to the count of votes.
20. National and Provincial Assemblies (Elections) Act, S.110.
21. Ibid, S.113.

To conduct elections to the Electoral College, the Chief Election Commissioner has to appoint an officer of the Government or local authority, to function as the Returning Officer for an electoral unit (22). For administrative convenience, the same person may be Returning Officer for two or more units, but this must not cause interference with the performance of his duties. Concerning elections to the Assemblies, there must be a Returning Officer for each constituency (23). The appointment is made by the Election Commission and, subject to any conditions imposed by it, the Returning Officer may require the assistant Returning Officers, also appointed by the Commission, to perform all or any of his functions (24).

It is the duty of the Returning Officer to secure the secrecy of voting and to do everything necessary for effectually conducting the election in accordance with the law. He must act with utmost impartiality throughout the elections. It is his duty to exercise a general superintendence and control over the whole election. For example, if he observes anything improper done by a candidate or his polling agent or other person, who may have been admitted for special

22. Electoral College Act, S.16.

23. National and Provincial Assemblies (Elections) Act, S.7 (1). By the explanation attached to the subsection, the definition of a constituency, as given in S.2(7), does not include a constituency for a reserved seat.

24. National and Provincial Assemblies (Elections) Act, S.7(2) and (3).

purposes to a polling station, it is his duty to see that such agent or person does not take advantage of his position to violate the law. If he sees a polling agent stealthily communicating with another person outside the polling station, thereby violating the principle of secrecy, he may have such person removed from the polling station and take such ~~person~~ further steps as may be necessary to prevent repetition of any breach (25).

The following are some of his main duties under the Electoral College Act and the National and Provincial Assemblies (Elections) Act: -

1. To provide a polling station for each electoral unit or constituency (as the case may be) (26);
2. To appoint a Presiding Officer and Polling Officers for each polling station (27);
3. to invite nominations (28), decide objections thereto (29) and publish the list of validly nominated candidates (30).

25. Parker: Election Agent and the Returning Officer (1950 ed.) p.31.
26. Electoral College Act, S.17; National and Provincial Assemblies (Elections) Act, S.8 (3).
27. Electoral College Act, S.18; National and Provincial Assemblies (Elections) Act, S.9 (1).
28. Electoral College Act, S.20; National and Provincial Assemblies (Elections) Act, S.11 (3).
29. Electoral College Act, S.23; National and Provincial Assemblies (Elections) Act, S.14.
30. Electoral College Act, S.24; National and Provincial Assemblies (Elections) Act, S.15.

4. To publish the list of contesting candidates after withdrawal, if any (31), publish notice of retirement(32) and publish the name of the returned candidate in the case of uncontested election (33);
5. to allocate symbols and give notice of the poll (34) and fix hours of the poll (35);
6. to supply (36) and inspect ballot boxes (37);
7. to adjourn the poll due to interruption and fix a fresh date for the election (38); and
8. to declare and publish the election result(39).

For elections to the National or a Provincial Assembly, a returning officer is further required to fix the

- Notes:
- 31). Electoral College Act, S.25 (4); National and Provincial Assemblies (Elections) Act, S.16 (4).
  - 32). Electoral College Act, S.26 (3); National and Provincial Assemblies (Elections) Act, S.17 (3).
  - 33). Electoral College Act, S.29 (2); Under S.20 of the Nat. and Provincial Assemblies (Elections) Act, the candidate is declared elected by the Returning Officer but his name is published by the Election Commission.
  - 34). Electoral College Act, S.30; National and Provincial Assemblies (Elections) Act, S.21.
  - 35). Electoral College Act, S.33; National and Provincial Assemblies (Elections) Act, S.26.
  - 36). National and Provincial Assemblies (Elections) Act, S.27; S.36 of the Electoral College Act, however, requires every candidate to bring his own ballot box (the merits and demerits of the system will be shortly discussed).
  - 37). Electoral College Act, S.36(2) and (3); as the ballotbox is to be supplied by the Returning Officer, a detailed procedure for inspecting the ballot box is not contemplated under the National and Provincial Assemblies (Elections) Act.
  - 38). Electoral College Act, S.34; National and Provincial Assemblies (Elections) Act, S.27 (under subsection (2)) Clause (b) prior approval of the Election Commission is necessary for fixing a fresh poll).
  39. Electoral College Act, S.46; National and Provincial Assemblies (Elections) Act, S.41. In the case of an Electoral College the election result is declared by the Presiding Officer & published by the Returning Officer; in the case of an Assembly election it is declared by the Returning Officer and published by the Returning Officer.

time and place for counting the votes (40), to verify the count in the presence of the candidates and their agents or to recount (41), to verify the ballot paper account (42) and to receive and keep the returns of the election expenses (43).

Thus in addition to his specified duties, the Returning Officer must do everything that is necessary for effectually conducting the election because he is charged with the general superintendence and control over the elections. At no point of time must he participate in a campaign for or against a candidate; he must not prevent any person from giving his vote or commit any act calculated to further or hinder the election of a candidate.

#### The Presiding Officer and his Staff

But the successful arrangement of an election will also depend, to no small extent, on the efficiency of the Presiding Officers and their staffs. A Presiding Officer is to be appointed by the Returning Officer for each polling station. To assist him an adequate number of polling officers are also appointed. But neither he nor a polling officer should, at any time, have been in the employment of a candidate (44).

40). National and Provincial Assemblies (Elections) Act, S.37

41). Ibid, S.38.

42). Ibid, S.39.

43). Ibid, S.50.

44). Electoral College Act, S.18 (1); National and Provincial Assemblies (Elections) Act, S.9 (1).



The Presiding Officer presides at the polling station as a representative of the Returning Officer; any fact or incident, which is likely to affect the fairness of the election, must be immediately reported to him; he must conduct the poll in accordance with the law and maintain order at the polling station(45). His duties, inter alia, are to maintain the secrecy of the ballot, by regulating the number of voters to ~~be admitted~~ be admitted at a time, by excluding any person whose presence is not necessary, by removing any person who misconducts himself, by issuing ballot papers to authorised voters, by examining the official mark on each ballot paper, so that none but the stamped papers are ~~taken~~ inserted in the ballot box and that no ballot papers are taken out of the polling station.

Under the National and Provincial Assemblies (Elections) Act, the Presiding Officer may, during the poll, entrust such of his functions, as may be specified by him, to any polling officer (46). There is no similar provision in the Electoral College Act, but it is submitted that it should be inserted in that statute. Both Acts provide that if the Presiding Officer is, for some reason, absent, one of the

45). Electoral College Act, S.18(2); National and Provincial Assemblies (Elections) Act, S.9(2).

46). National and Provincial Assemblies (Elections) Act, S.9(2).

polling officers should be authorised by the Returning Officer to perform his functions in his absence(47). In Moulvi Abdullah v. S. Sher Ali(47a) the Election Tribunal held that the proviso to clause(2) of S.9 of the National and Provincial Assemblies (Elections) Act applies to a delegation by a Presiding Officer, who remains in the polling station but clause(3) applies when the Presiding Officer is absent and the delegation must be by the Returning Officer before the absence commences.

No qualifications are prescribed for becoming a Presiding Officer or a polling officer but it is stated that, if a person is in the employment of a candidate he will be disqualified(48). Past employment is a disqualification only under the Electoral College Act. The omission in the Assemblies(Elections) Act is to be regretted. It is submitted that Presiding Officers and polling Officers should not be appointed from among the executive and revenue departments of the Government, if persons from other governmental or semigovernmental institutions like colleges, banks, cooperative and other departments are available. It is not suggested that in practice this is often done but the need is for a specific provision in the election laws.

A Presiding Officer or a polling officer, who does not perform his functions properly is to be suspended by the Returning Officer after recording his reasons for doing so(49).

47). Electoral College Act, S.18(3); National and Provincial Assemblies(Elections) Act, S.9(3).

47a). P.L.D.1968 J.79.

48). Electoral College Act, S.18(1) proviso; National and Provincial Assemblies(Elections) Act, S.9(1) proviso.

49). Electoral College Act, S.18(4); National and Provincial Assemblies(Elections) Act, S.9(4).

Since the said action can be taken by the Returning Officer at any time, even during the poll, it is desirable that alternative arrangements should be first made in order that the conduct of the election is not materially affected. It is submitted that a failure to do so will constitute a material irregularity committed by the election staff, and a fresh poll will be ordered by the Election Tribunal.

Procedure Before the Poll

Before describing the actual poll, a brief account of the provisions of law concerning meetings, polling stations, ballot boxes, symbols and polling agents may be useful.

ARTICLE 173 of the Constitution, inter alia, requires the Legislature to ensure -

- " a) that each candidate at an election has the opportunity, and so far as practicable, equal opportunity with other candidates of addressing the persons who are entitled to vote at the election; and
- b) that the persons entitled to vote at the elections have the opportunity of questioning each candidate, face to face."

To implement these constitutional directions, provisions have been included in ss.46 and 47 of the National and Provincial Assemblies (Elections) Act, 1964. The meeting, which may only be called as and when required by the Election Commission, is to be presided over by a member of the Judicial Service or a non official, who is not a partisan in the election. On the day fixed for the meeting the holding of any other meeting within the constituency is prohibited; this is considered

necessary in the interest of public order.

At the meeting a candidate may explain his election manifesto but he must refrain from casting reflection on other contesting candidates, except insofar as it relates to the aims and objects of that candidate. Questions relevant to the candidature of a candidate may only be asked by the electors. Any question, which is calculated to scandalize a contesting candidate, must be discouraged and disallowed by the Presiding Officer.

Any person who misconducts himself at a meeting, by acting in a manner conducive to the maintenance of order, commits an offence and is liable, on conviction, to a sentence of imprisonment for one month or a maximum fine of Rs.100/-(50).

There was no express provision for representatives of the press to attend, but it ~~was~~ later incorporated in the original Act by the National and Provincial Assemblies (Elections) (Amendment) <sup>Ordinance</sup> ~~Ordinances~~, 1965 (51). Newspaper reporters may now attend and prepare a factual account of the proceedings; a question, the publication of which has been forbidden by the Presiding Officer, must not be included. It is illegal to publish anything relating to a meeting, except a correct factual report of its proceedings, or to give headlines to it for a purpose other than of designating the meeting to which it relates (52).

50. National and Provincial Assemblies (Elections) Act, S.93.

51. Ordinance 1 of 1965, S.6 (Gazette of Pakistan Extraordinary dated 5th Jan, 1965).

By S.10 of the Constitution (Second Amendment) Act, 1964 an explanation was appended to ARTICLE 173, the effect of which has been to make the ARTICLE inapplicable to elections to the Electoral College. Thus no provision is to be found in the Electoral College Act for the holding of meetings between the candidates and voters. In the Act, as originally framed, S.74, dealing with punishment for misconduct ~~at~~ such a meeting appeared. But realising the error on the part of the Legislature an amendment was passed and the said section deleted (53). However, this indicates the anxiety of the Legislature to provide for the holding of meetings under the Electoral College Act. It is submitted that such provisions ought to be incorporated in the Act for the following reason. There being no specific bar, it cannot be argued that it is illegal for the candidate to address the voters at an election to the Electoral College and in that case, there should be provisions regulating their procedure, to ensure quiet elections.

For elections to the Electoral College the Returning Officer is required to provide at least one polling station for each electoral unit(54).

52. National and Provincial Assemblies (Elections) Act, S.46(2) read with S.93.

53. Electoral College (Amendment) Ordinance, 1964, S.8.

54. Electoral College Act, S.17.

For elections to the Assemblies the Returning Officer must submit to the Election Commission a list of the proposed polling stations in a constituency. After amendment, if any, the final list is published by the Election Commission (55). The Electoral College Act and the National and Provincial Assemblies (Elections) Act provide that a polling station may not be located in any premises in the occupation or possession of a candidate (56). But it may be pointed out that the provisions in both statutes, concerning location of polling stations, are inadequate; this is especially true of the Electoral College Act. It is submitted that an ~~expression~~ provision for inviting objections and suggestions should be incorporated in the law. In doing so, the convenience of the voters and the candidates must be kept in mind. Under Section 36 (1) of the Electoral College Act every candidate has to bring his own ballot box, which must conform to the specifications prescribed by the Chief Election Commissioner. Section 36 (2) reads:

"At least three days before the poll, every candidate shall produce his ballot box for inspection of the Returning Officer who shall, if he is satisfied that the ballot box is of the required specification, paste thereon a slip containing his initials and the date of inspection and return it to the candidate for delivery to the presiding officer at least one hour before the commencement of the poll".

(The underlining is that of the author).

55). National & Provincial Assemblies (Elections) Act, S18

56. Electoral College Act S 17 provisio, Nat. & Prov. Assm. (Elections) Act S 8 (4).



It will be seen that a further duty is cast on the candidate to produce his ballot box for examination of the Returning Officer three days before the poll; if the Returning Officer is satisfied, he will return the box with his initials thereon; the candidate should then deliver it to the Returning Officer, at least half an hour before the commencement of the poll. According to the Peshawar Bench of the West Pakistan High Court (57), these provisions are mandatory because of the following penal clause attached to S.36, which is couched in the following words:

"A candidate who fails to produce his ballot box to the Returning Officer for inspection shall be deemed to have retired under Section 26".

A literal interpretation of S.36 (2) is that it prescribes two separate duties: a) "production" of the ballot box for inspection of the Returning Officer and b) its "delivery" to the Presiding Officer; each duty is quite independent of the other and must be complied with. But whereas failure to produce for inspection as in a) calls for punitive action under S36 (3); the failure to deliver the box to the Presiding Officer within the stipulated time does not. If this interpretation be accepted, one must readily concede that the provision, under discussion, is very harsh, insofar as a person who fails to produce his box three days before the poll will be deprived of his candidature, although he may have been prevented from doing so for reasons

beyond his control. It is submitted that in cases where a candidate can give sufficient excuse for non compliance with the technical provision, the penalty shall not be imposed.

As regards the production of the ballot box before the Presiding Officer, the expression "at least one hour before the commencement of the poll" in S 36 (2) is only directory; no penalty is provided for in case a candidate fails to bring his box by the stipulated time. The said expression can be best interpreted in the light of S.37 which states that half an hour before the poll, the Presiding Officer must, inter alia, ascertain that every box delivered to him is empty and demonstrate this to the candidates and their polling agents. So it is reasonable to infer that a ballot box produced, before the Presiding Officer proceeds to act under S 37, will be deemed to have been properly delivered and the Presiding Officer has no power to refuse it. But the matter can be resolved, if the system of requiring each candidate to bring his own ballot box, which proved unsatisfactory at the 1964 election, is discontinued for future elections to the Electoral College. It may be mentioned that the principal reason why this system was adopted for elections under the Electoral College Act was that voters being illiterate, ~~they~~ were not capable of marking their ballot papers suitably. This would be untenable in the face of serious criticism (shortly to be stated). It is submitted that the law should be amended so as to introduce the single ballot box system as existing under the National and Provincial Assemblies (Elections) Act.

The position under the National and Provincial Assemblies (Elections) Act is different. At each polling station, one ballot box, of the kind prescribed by the Commission, must be used for all the contesting candidates; when it becomes full another may be used (58). It should be noted that the responsibility to provide ballot boxes is that of the Returning Officer and not the candidates. It is for this reason that there is no provision similar to S.36 of the Electoral College Act.

The question whether a single ballot box for all candidates or a ballot box for each candidate should be used at an election has been the subject of discussion in Pakistan (59). The advantage and disadvantages may be briefly stated thus: those who favour the former system say that it ensures a check against a miscreant, supporting a particular candidate, <sup>endeavouring</sup> to destroy or remove the latter's ballot papers or otherwise destroying the same without breaking the box. As against this, it is argued that under such a system, a single set of ballot papers containing the names or symbols or both of the candidate will be used, and each voter required to put the prescribed mark against the name or symbol of the desired candidate, which presupposes a higher intellectual standard than the average Pakistani possesses, most of the voters being illiterate. In favour of a ballot box for each candidate it may be said that as every ballot box will have the distinguishing symbol of a

58). National & Provincial Assemblies (Elections) Act, S.29.  
59). Report of the Electoral Reforms Commission, 1956.

candidate on its outside, it is easy for the illiterate voter to select the box of the candidate of his or her choice; ballot papers need not contain the name of any candidate or his symbol which will facilitate counting and is thus timesaving and ensures early completion of elections.

There is an additional reason why a single ballot box should be used in elections to the Electoral College. The Constitution and the law require a voter to cast his vote in secret; ballot boxes of the contesting candidates of an Electoral College election are placed in separate secret compartments; this could enable the unscrupulous voter to take the ballot paper out of the polling station, show it to his favourite candidate and either give it to him or hand it over to another voter, at the instance of the candidate, to be cast subsequently thus violating the principle of secret ballot.

The symbols from which candidates may choose are prescribed and limited (60). Where possible the preference of a candidate will be taken into account but the powers of the Returning Officer are subject to any directions of the Chief Election Commissioner, in the case of elections to the Electoral College, and the Election Commission, in the case of elections to the Assemblies (61). The allocation of symbols is not a very serious matter and no dispute has so far been referred to the Court under the present election laws in Pakistan.

60). Electoral College Rules, r.29(2) and Schedule 1; Nat. & Prov. Ass. (Elections) Rules, r.19.

61). Electoral College Act, S.30(1)(a); Nat.& Prov.Assem. (Elections) Act, S.21(1)(a).

The appointment of a polling agent is not imperative but if a candidate desires to appoint one, and it is always advisable to do so, it can only be done before the commencement of the poll. The maximum number of polling agents that may be appointed is two for elections to the Assemblies and one for elections under the Electoral College Act (62). But it appears from the decision of the West Pakistan High Court in Haji v. Election Tribunal (63), a case under the Electoral College Act, that the appointment of more than the permissible number is only an irregularity and the result of the elections cannot be said to be materially affected thereby.

No qualifications are prescribed for a polling agent; Government servants are eligible, provided they confine themselves to only such functions, in connection with the poll, as are authorised under the law. It may be mentioned that a considerable amount of care is necessary for selection of a polling agent. His duties demand tact, judgement and discretion; only persons with these <sup>capabilities</sup> ~~qualifications~~ should be appointed. A familiarity with the voters in the polling area and knowledge of the election law is desirable.

Whereas under the National and Provincial Assemblies (Elections) Act, besides polling agents, an election agent may also be appointed, the latter for the sole purpose of keeping

62). National and Provincial Assemblies (Elections) Act, S.23.  
Electoral College Act, S.31.

63). P.L.D. 1966 K.312.

books of account (64); the Electoral College Act speaks only of a polling agent. The reason seems to be that the failure to file a return of election expenses is neither a corrupt nor an illegal practice nor, in fact, is there any requirement that an account of expenses be kept. The functions to be performed by polling agents under both Acts are expressed in the following general terms:-

"a polling agent shall perform such functions as are required by or under this Act to be performed by a polling agent "(65)

(The underlining is that of the author).

It is interesting to note that "such functions" have not been specified. Yet a polling agent should be advised to conduct his candidate's election with due care, dilligence and skill, not forgetting that a true election is one that is both legally and honourably won.

It is useful to refer to S.53 of the English Representation of the People Act, whereunder a polling agent must not interfere with or attempt to interfere with a voter when recording his vote, obtain or attempt to obtain in a polling station information as to the candidate for whom a voter in that station is about to vote or has voted, communicate at

- 64). National and Provincial Assemblies(Elections)Act, SS.22,24 (1). The duties of an election agent will be stated while dealing with the chapter on Election Offences, i.e., Chapter 7.
- 65). Electoral College Act, S.31(3); National and Provincial Assemblies (Elections)Act, S.24 (2).



anytime to any person any information obtained in a polling station as to the candidate for whom a voter in that station is about to vote or has voted or as to the number on the back of the ballot paper given to an elector at the election. Moreover, he must not induce a voter to display his ballot paper after he has marked it so as to make known to any person the name of the candidate for or against whom he has or has not voted. Besides preventing personation, by challenging voters who appear to him to have committed it, he must also discourage plurality in voting. It is submitted that these provisions may be usefully incorporated in the Pakistan statutes. Although by no means exhaustive, they are some of the duties which should be required of a polling agent.

The appointment of a polling agent may be revoked if he becomes incapable of acting. It is absolutely necessary to give notice of the new appointment to the Presiding Officer(66).

#### The Poll

##### General Provisions

The polling day is to be appointed by notification in the Official Gazette. It is essential that ten clear days should lapse between the day fixed for withdrawal of candidature of the Electoral College and the taking of the poll; the

66). Electoral College Act. S31(2); National and Provincial Assemblies (Elections) Act S.23 (2).

interval in the case of elections to the Assemblies must be of fifteen days (67). The hours during which the poll will be taken are also fixed. Since the statutes require strict observance of the polling hours, it is necessary that the Returning Officer should give public notice of the same (68). The polling programme may not be changed even with the consent of the contesting candidates (69). Polling may not commence before the time fixed for its commencement nor should it be allowed to continue beyond the time stipulated for its close. In Jassimuddin v. Matiur Rehman (70), the poll was scheduled to close at 2 p.m. But finding that all the electors had cast their votes, the Presiding Officer closed the poll and completed the counting long before the scheduled hour. It was held that it was incumbent on the Presiding Officer to have waited till 2 p.m. and therefore, the result of the election had been materially affected.

To maintain law and order at the polling station, canvassing within a radius of 400 yards is forbidden by law (71),

- 67). Electoral College Act, S.19(1) & S.30(1)(C); Nat. & Prov. Assemblies (Elections) Act, S.11(1)(d) and S.21(1)(C).
- 68). Electoral College Act, S.33; Nat. & Prov. Assemblies (Elections) Act, S.26.
- 69). Md. Ismail v. Haji, Akhtar (1935-50) 1 D.E.C. p.36.
- 70). P.L.D.1964 J. 16.
- 71). Electoral College Act, S.66; National and Provincial Assemblies (Elections) Act, S.85.

unauthorised persons and persons who misconduct themselves are to be excluded and the number of voters admitted into the polling station at any time is regulated (72).

A Ballot Paper must be issued after the Presiding Officer is satisfied about the identity of the voter or elector, as the case may be (73). This can be difficult. It is a matter of common knowledge that in towns with a floating labour force, where people are constantly changing their place of abode, it is difficult to identify persons who claim that right to vote. This is particularly true in large cities, where often one does not know one's next door neighbour; as a result personation is common in urban areas. The Electoral Reforms Commission, which submitted its report to the Pakistan Government in 1956, suggested the issue of identity cards with photographs for all those eligible to vote, although an ~~an~~ objection had been raised that it would be impractical, especially in the case of female voters. The provision is incorporated in the National and Provincial Assemblies (Elections) Act, 1964; under rule 10 of the Rules framed thereunder, every elector must be provided with an identity card under the seal and signature of an officer appointed by the Commissioner. This card must be shown to the Presiding Officer at the time the ballot paper is issued. It

72). Electoral College Act, SS.38,39; National and Provincial Assemblies (Elections) Act, SS.30,31.

73). 'Voter' for election to the Electoral College; 'elector' for election to the Assemblies.

may be mentioned that identity cards have been given to all members of the Electoral College and basic democrats and to avoid duplication, the<sup>Election</sup> Commission directed that those already in possession of identity cards may not be given one under the provision stated above.

In Electoral College elections in 1964, personation was reported from polling stations reserved exclusively for women voters. The reason is that most women are or claim to be "pardha nasheen" (74) ladies at the time of the elections and it is not possible to challenge their identity, even if the station is run under the control of a lady Presiding Officer and her staff. It is submitted that the recommendations of the Electoral Reforms Commission should also be implemented in the Electoral College Act; issue of identity cards to voters would help to cut down personation at elections held thereunder.

Under the law, a duty has been cast on the Presiding Officer to put the official mark and his initials on every ballot paper issued by him (75). The question as to whether this provision is mandatory or directory or, ~~to~~ to put it in other words, what effect the absence of either the official mark or the initials would have on the validity of a ballot paper, arises.

74). Women who observe the veil and should not appear in public. They are in certain cases also exempt from personal appearance in a court of law.

75). Electoral College Act, S.40 (2)(C); National and Provincial Assemblies (Elections) Act, S.32 (2)(b).

The difficulty is due to the presence of S.45(1)(a) in the Electoral College Act, which appears to be inconsistent with S.40(2)(c) and S.36 (1)(b)(~~1~~) and S.38(2)(a) in the National and Provincial Assemblies (Elections) Act, which are prima facie inconsistent with S.32 (2)(b) of the same Act. It is useful to set down these provisions for facility of reference and interpretation. S.45 (1) of the Electoral College Act ~~reads:-~~ reads:-

"Immediately after the close of the poll... the Presiding Officer shall... open the ballot box of each contesting candidate... and count the ballot papers contained in the ballot box so opened excluding invalid ballot papers, that is to say, the ballot papers

a) which do not bear the official mark, or

b) ....."

It will be seen that a ballot paper can be rejected as invalid, under clause (a), if it does not bear the official mark but not if the initials are missing therefrom. In other words, an official mark is considered more authentic and absence thereof will render a ballot paper invalid. The position, however, is different under the National and Provincial Assemblies (Elections) Act. Section S.36 (1) provides: -

"Immediately after the close of the poll... the Presiding Officer shall...,

a) open the used ballot box.....;

b) count..... the ballot papers in favour of each contesting candidate excluding from the count the ballot papers which bear -

i) no official mark or initials of the Presiding Officer.

(the underlining is that of the

It will be observed that the conjunction "or" has been used in subclause (i) of clause (b) which means that a ballot paper which does not bear either the official mark or the initials must be excluded.

Similarly, while counting, the Returning Officer must reject a ballot paper, if it bears no "official mark or initials of the Presiding Officer " (76). In Jamal Shah v. Nasarullah (77) the Returning Officer excluded two ballot papers of Jamal Shah on the ground that they did not bear the initials of the Presiding Officer. In appeal, the learned Member of the Election Commission held that they were valid and counted them. He was of the view that a ballot paper which contained either the official seal or the initials of the Presiding Officer should not be rejected, because it would tantamount to disenfranchising a person for no fault of his own. A writ was sought from the High Court, under its extraordinary jurisdiction under ARTICLE 98 of the Constitution, to set aside the order of the learned Member as being devoid of lawful authority. A Full Bench of the High Court, inter alia, held that the intention of the Legislature was to strictly enforce S.32 (2)(b) of the Act and a ballot paper which does not bear both the mark and the initials should be rejected (78).

76). National and Provincial Assemblies (Elections) Act, S38(2)(a)

77). P.L.D.1965 J.89.

78). Khan ~~v.~~ Nasarullah v. Member, Election Commission, P.L.D.1966 L. 850.



On appeal to the Supreme Court, Cornelius, C.J., expressed the view that the duty to apply the official seal and place initials was clearly that of the Presiding Officer. His Lordship said,

"There is, therefore, a ground for thinking that the existence of the official mark is by itself sufficient to show that the paper passed through this process at the hands of the Presiding Officer, and it was mere act of inadvertence on his part that he failed to initial it at the same time." (79)

Thus the Supreme Court was inclined towards the interpretation that a failure to initial should not invalidate a ballot paper under the National and Provincial Assemblies (Elections) Act.

Some of the cases under the Electoral College Act may now be stated. In Malekuddin v. R. Islam (80), the petitioner filed an election petition contending that twenty-six ballot papers of the respondent, which did not bear the official mark, as required by S.40(2)(c), were liable to be excluded from the Count. The Tribunal found the allegation to be true but declined to grant the relief, on its interpretation of S.45, that since the ballot papers did bear the initials, they could<sup>not</sup> be rejected. The High Court reversed the order. Sattar, J., said,

79). Jamal Shah v. Member, Election Commission, P.L.D.1966 S.C.1 at p.43.

80). P.L.D.1966 D.120.

"The positive mandate of the Section (S.45), therefore, is the Presiding Officer is not to count the ballot papers which do not bear the official mark. This provision, in our view, cannot by any stretch of the imagination be only directory and not mandatory."(81)

S.A.Mahmud, J., of the West Pakistan High Court, is of the following view:-

"Section 45 (1) serves two purposes. It defines an invalid ballot paper and secondly it enjoins that the Presiding Officer shall count the ballot papers found in the ballot box, except the invalid ballot papers. The invalid ballot papers are those a) which do not bear the official mark or b) on which anything is marked or written by the voter by which he can be identified. The ballot papers falling under these two classes are invalid. The other ballot papers not falling under these clauses are not invalid and by reason of the mandate in this section (SIC) must be counted in favour of the candidates from whose ballot box they are recovered. The provision that the Presiding Officer shall count the ballot papers except those invalid, is mandatory, so that the Presiding Officer has no option in the matter. A candidate is entitled to demand that ballot papers, other than invalid papers found in his ballot box, shall be counted in his favour". (82).

The Court held that a duty was imposed on the Presiding Officer to stamp the ballot paper with the official mark and initial if under S.40(2)(c) but that was merely directory; ballot papers bearing <sup>the</sup> official mark but not initialled by the Presiding Officer cannot be declared invalid under S.45 (1) and excluded from the

81). Ibid at p. 121.

82). Md. Ibrahim v. Election Tribunal, P.L.D.1966 L794 at pp 795 and 796.

count; and it was mandatory for the Presiding Officer to count all ballot papers except those found invalid under S.45.

In Raziur Rehman v. Akbar Ali (83) it was held that the provision being unambiguous and penal in its nature, its consequence could not be extended so as to invalidate ballot papers without the initials of the Presiding Officer; the official mark is a sufficient indication that the ballot paper is genuine; and S.40(2)(C) of the Electoral College Act, ~~ix~~ which requires both the official mark and the initials, is directory only. This case went up to the Supreme Court, where their Lordships held that the Legislature had only provided under S.45 (1)(a) that the Presiding Officer shall exclude the ballot paper which "does not bear the official mark" although S.40, which prescribed the voting procedure, inter alia, laid down that a ballot paper before issue to the voter, be stamped with the official mark and initialled by the Presiding Officer. Yaquub Ali, J., giving the judgement of the Court said:

"There is no inconsistency between the provisions of Section 40 and Section 45, if they are read side by side. While the Presiding Officer may be required by Section 40 to fulfill both the conditions, a ballot paper shall be rejected only if it does not bear the official mark". (84)

83). P. L. D. 1967 L. 699.

84). Akbar Ali v Raziur Rehman, PLD 1966 S.C.492 at p. 497.

The view expressed by the Supreme Court is the law declared and is binding on all courts and authorities.

At the time of issue of a ballot paper, the counterfoil must be initialled by the Presiding Officer; in an election under the Electoral College Act, it should also bear the official mark and the number of the voter as given on the Electoral Roll (85). To check against double voting and impersonation, it is further provided that a mark be placed on the electoral roll against the name of the voter or the elector, which will indicate that a ballot paper has already been issued to him (86).

#### Tendered Ballot Papers

Tendered ballot papers may be issued to voters under the Electoral College Act but not under the National and Provincial Assemblies (Elections) Act (87). This gives a voter an opportunity to exercise the right, if he claims to vote but the electoral roll shows that a ballot paper has already been issued to him or to someone who has impersonated him. The name and number of such a person must be entered in the "tendered"

- 85). Electoral College Act, S.40(2)(d); under S.32(2)(c) of the National and Provincial Assemblies (Elections) Act the elector is required to put his signature or thumb impression on the counterfoil of the ballot paper.
- 86). Electoral College Act; S.40(2)(b); Nat and Prov. Assemblies (Elections) Act S.32(2)(a).
- 87). Electoral College Act, S.41 Provisions have been made under the English Representation of the People Act 1949, and the Indian Representation of the People Act, 1951.

voters list". (88) A tendered ballot paper, instead of being put into the ballot box, must be given to the Presiding Officer to be kept in a separate packet "with the name of the candidate for whom he wishes to vote" (89). The provision for endorsing the name of the candidate, in whose favour the tendered vote has been given, calls for a comment: it is submitted that this is against the principle of secrecy of the ballot, which is required to be maintained in all elections held under the Constitution (and which we shall be dealing with presently) Neither the Parliamentary Elections Rules contained in the Second Schedule of the English Representation of the People Act 1949 nor the Indian Conduct of Election Rules 1961, on which the present provision in the Electoral College Act are based, incorporate such a provision. It has been held in Dil Md. v. Election Tribunal (90) that a tendered ballot paper cannot be counted in favour of the person for whom it was intended to be cast and that the result of the election should be declared without taking it into account. Its object was expressed by S.A.Mahmood, J., as follows:-

88).Electoral College Act, S.41(3); Electoral College Rules, r.31 and Form XII of the Schedule.

89).Ibid, S.41 (2).

90).P.L.D. 1966 L.669 at p 672.

"the purpose which tendered ballot papers may serve is to show that some "bogus" person casting a vote in place of the real person, who obtained the tendered ballot paper, and who was the genuine voter.... the vote cast by the other person could be discounted from the count, if the Election Tribunal is satisfied that the same person has not come again to obtain a tendered ballot paper."

### Challenged Ballot Papers

A candidate or his agent may object to the issue of a ballot paper to a voter under the Electoral College Act (91). This is known in law as a challenge of voter and is subject to two main conditions: (a) a declaration must be made by the candidate or the agent (as the case may be) that there exists a reasonable cause to believe that the voter in question has committed the offence of personation and he can substantiate his allegation in a court of law and (b) a deposit of Rs.5 is made as required by Rule 32 of the Electoral College Rules. After such a person has been warned of the consequences of personation and his signatures and thumb impression have been taken down on the counterfoil, the Presiding Officer will issue a ballot paper to him and enter his name on the Challenged Votes List. Challenged votes are not required to be separated from the other votes, which might lead one to think that they are to be counted

91). Electoral College Act, S.42.



while preparing the result. But <sup>in</sup> Shah Md. v. Nawab Khan (92) they were excluded under those circumstances. At the election the petitioner obtained 230 votes as against the respondent, who received 222. The latter challenged 13 votes of the former, which had been excluded from the count by the Presiding Officer, but the Election Tribunal included them in favour of the unsuccessful candidate. It was, inter alia, contended that, as the said 13 ballot papers had been collected from the voters, it was wrong to presume that they, in fact, wanted to vote for the petitioner; only the ballot papers which ~~a~~ were recovered from his ballot box could be counted. It was argued that it was difficult to say with conclusiveness that every prospective voter, whose vote is challenged, would cast his vote for the challenging candidate. Afzal Cheema, J., said,

"The contention has obviously some force as the possibility of changing one's mind at the last moment, before inserting the ballot paper in the ballot box or inadvertently putting it in the ballot box of the candidate other than the one for whom an ignorant and illiterate voter might have intended to vote, cannot be ruled out. It is a matter of common knowledge that in keenly contested elections there may be cases of equality of votes or success or failure by the narrowest inadvertance on the part of the ignorant voters, though not very frequent, have been noticed and cannot be altogether excluded.

92). P.L.D. 1966 L.904.

~~92) Ibid, at p. 904.~~

Even otherwise the emergence of a voter from the camp of a certain candidate is not per se a sure test of his choice for him as experience has completely belied such a presumption". (3).

It may be mentioned that the particular circumstance, which weighed with the court in declaring the order of the Tribunal as being in excess of his jurisdiction, was ~~that~~ the challenged votes were not recovered from the ballot box but collected from the voters; indeed it will be difficult to say for whom they were intended to be counted. Till a court rules otherwise, in the face of the language of the Statute and the absence of a provision for separating challenged votes from the other ballot papers, as in the case of tendered ballot papers, such ballot papers should be regarded as valid and be counted.

The manner of challenge of a voter is the same in India. But the Presiding Officer must hold an on the spot enquiry and issue the ballot paper, only, if he considers the challenge has not been established (94).

#### Secrecy of the Ballot

The purpose of an election in a democracy is to give an opportunity to the people to choose their President and legislators, not only to exercise the executive and legislative powers but also to act as custodians of the Constitution.

93). Ibid, at p.909.

94). (Indian) Conduct of Elections Rules, r.36.

It can be an instrument for peacefully effecting a change of Government, if so desired by the people. It is necessary that the people should be enabled to make their choice freely by protecting them from ~~the~~ pressure from persons or parties. Voting by secret ballot is a system for ensuring a fair and honest election.

To ensure secrecy of the ballot is to assure a voter that he can exercise his vote uninfluenced by an extraneous pressures, undue influence, intimidation, coercion and the like. There must be an effective guarantee to the elector that he can exercise his vote secretly, without any fear of his identity being disclosed and a corresponding duty on the voter to prevent his ballot paper being seen by any person. A breach of secrecy of the ballot may result in the following three ways:

- i) interference with an elector at the time when he records his vote;
- ii) obtaining in a polling station information as to the candidate for whom an elector in that election has voted or may vote; and
- iii) communicating that information to others.

The Constitution of Pakistan has advocated ~~that~~ the principle of secret ballot in the following words:

"All elections and referendums (sic) under this part shall be decided by secret ballot" (95).

95). ART. 172.

While interpreting this ARTICLE in Jamal Shah v. Nasarullah (96), Iqbal, J., observed that it implies that secrecy of ballot does not confer any right on an elector. If so, he could waive it and show his vote to some other person. But he cannot do this, because it would encourage persons or parties to declare that they did not want the protection afforded by the voter and would declare their choice before casting their ballot papers into the ballot boxes; this would subvert the system of elections by secret ballot, which the Constitution has imposed on all persons conducting and participating in an election.

Whether that purpose has been served by the enactment of the Electoral College Act and the National and Provincial Assemblies (Elections) Act may now be examined. S.28 of the latter Act provides -

"The elections under this Act shall be decided by secret ballot and every elector shall vote by means of a ballot paper the form whereof shall be prescribed."

S.29(6) requires that a Presiding Officer must see that every elector marks his ballot paper in "secret" before the same is folded and inserted in the ballot box. S.32(3) directs the elector to put "secretly" the prescribed mark on the ballot paper. Under S.36(1)(h)(ii) and S.38(2)(b) ballot papers which have a mark by which an elector can be identified are to be 96). P.L.D.1965 J. 89.

excluded from the count and rejected. It is an offence under S 88 to interfere with the secrecy of the ballot, for which a punishment of six months imprisonment or fine upto Rs.500/p may be imposed. An election official, a candidate, an election agent, a polling agent and a person authorised to attend the count, is liable to be punished if he -

- i) fails to maintain or aid in maintaining the secrecy of voting,
- ii) communicates, except for any purpose authorised by law, to any person before the poll is closed, any information as to the official mark,
- iii) communicates any information, obtained at the counting of votes, as to the candidate from whom any vote is given by any ballot paper (97).

Concerning elections to the Electoral College, it is stated that:-

"every voter shall cast his vote by means of a ballot paper which shall be in such form as may be prescribed". (98)

It will be noticed that the words "secret ballot", which were contained in Sections 28 of the National and Provincial Assemblies (Elections) Act, have been omitted. But this does not imply that the elections thereunder are not held by secret ballot; firstly because the Electoral College Act has been enacted under the Constitution and is intra vires the same and secondly, whenever

97). National and Provincial Assemblies (Elections) Act, S.89.

98). Electoral College Act, S.35.

the law simply says that voting shall be by ballot, without specifically saying it shall be secret, the system nevertheless implies secrecy (99); and thirdly the following, amongst other, provisions negative any such suggestion:-

"the voter on receiving the ballot paper shall forthwith enter the room or compartment in which ballot boxes are placed and shall secretly place his ballot papers in the ballot box.... of the candidate for whom he wishes to vote" (1).

(the underlining is by the author)

Again S.45 (1)(b) provides for exclusion of a ballot paper on which anything is marked or written by the voter by which he can be identified. Interference with the secrecy of voting is an offence under S.69 and failure to maintain secrecy is also an offence under S.70.

Thus secrecy of the ballot is considered sacred and care has been taken to give full legislative effect to ARTICLE 173. Its success will depend upon the substantial compliance with the provisions, contained in the statutes, at the time of elections.

#### The Marking of Ballot Paper

Since separate boxes are used for candidates under the Electoral College Act, the question how a ballot paper should be marked, arises only in the case of elections to the 99). Panjab Landholder's Case, 2 D.E.C.163.  
1). Electoral College Act, S.40 (3).



Assemblies. The National and Provincial Assemblies (Elections) Act, as originally enacted, provided for a mark to be placed against the name of a candidate. Before the elections, however, the words "the prescribed mark" were substituted for "mark"(2). The "prescribed mark" means a "cross mark in any form, and no other mark" (3). The words "no other mark" indicate the mandatory nature of the provision, which is further affirmed by the provision that a ballot paper, which does not bear the prescribed mark, is to be excluded from the count by the Presiding Officer(4) and rejected by the Returning Officer (5). In Jamal Shah v. Member Election Commission (6), instead of the prescribed mark the ballot papers contained either a tick mark or a line. It was held that the requirement that a voter should put the prescribed mark on the ballot paper is mandatory, which intention was manifest from the amendment, and a non-compliance therewith rendered the ballot papers invalid.

The elector is required to put the prescribed mark against the name and symbol of the candidate (7). This provision

2). National and Provincial Assemblies (Elections) Amendment Ordinance, 1965, S.4.

3). National and Provincial Assemblies (Elections) Rules, rll (i).

4). National and Provincial Assemblies (Elections) Act, S.36(1)(b) (iii).

5). Ibid, S.38 (2)(c).

6). P.L.D.1966 SC 1.

7). National and Provincial Assemblies (Elections) Act, S.32(3)(b).

is not mandatory. It does not say that the mark should be made in any particular place on the ballot paper. In other words, if, by looking at the ballot paper, it can be ascertained that the elector intended to vote for a particular candidate, the ballot paper cannot be invalidated.

In Jamal Shah v. Nasarullah (8), the cross mark was not put in its appropriate chamber but in the column which contained the symbol of the candidate. Iqbal, J., observed:-

"It is not required under the Act or Rules that the mark should be made in any particular place of the ballot paper. If a space is provided for the purpose and the elector does not put the mark in that space, but against the name (or the symbol) of the candidate, thereby indicating his intention to vote for a particular candidate, the requirement of the law is satisfied and the ballot paper cannot be rejected on that score". (9)

The view of the learned Member of the Election Commission was upheld by the Supreme Court of Pakistan (10).

In Abdul Hai v. Election Commission (11), a case under the National and Provincial Assemblies (First Elections) Order (12) and the Rules (13), the cross mark had been ~~put~~ put on the left of the candidate's name instead of the place provided on the right. It was held that the failure to put the mark at such a place cannot be said to be a violation of a mandatory provision; the requirement that it should be marked against the name of the

8). P.L.D.1965 J 89.

9). Ibid at p.93.

10). Jamal Shah v. Member, Election Commission, P.L.D.1966 S.C.1.

11). P.L.D.1964 D.460

12). ART.32(3)(b) of the 1962 Order corresponds with S.32(3)(b) of the Nat. & Prov. Ass.(Elections) Act, 1964.

(13) See Abdul Hai

candidate had been fulfilled. According to Sattar and Chowdhury JJ., -

"fixation of place was for the guidance of the voter. Place fixed, it is true, was to the right of the name of the candidate but the mark has been put to the left. It has nevertheless been against the name of the candidate. We also agree with the finding of the appellate authority, the Election Commission, that the ballot paper in question has been marked at a place, which clearly shows the intention of the voter was to cast his vote in favour of respondent No.2"(14).

The overriding factor then is the intention of the voter. If it can be ascertained by looking at the ballot paper, the ballot paper must be counted. According to Schofield, in all cases which have been before the Courts, the Judges have indicated that the voter's franchise should not be lightly lost by declaring a vote to be bad, if there is a clear intention shown as to what the voter intended to do (15).

A voter or elector must refrain from putting any mark by which his identity can be disclosed. A ballot paper, which bears a mark by which the elector can be identified, is to be excluded from the count under S.36 (1)(h)(ii) and S.38(2)(b) of the National and Provincial Assemblies (Elections) Act (16).

13). R.5 of the National and Provincial Assemblies (First Elections) Rules, 1962, corresponds with r.11 of the National and Provincial Assemblies (Elections) Rules 1964.

14). P.L.D. 1964 D.460 at p. 465.

15). Schofield N.J., Parliamentary Elections (1955). p.38.

16). It may be mentioned that under S.45 (1)(b) of the Electoral College Act a ballot paper on which anything is marked or written is invalid.

The words "bear a mark" have been interpreted to include an article that may be put in the fold of a ballot paper (17). The provision that a ballot paper, which bears a mark and thereby discloses the identity of the elector, is to be rejected, is capable of two meanings. One, that a candidate or some other person concerned with the election is in fact able to identify the voter on account of the mark and the other that, although the elector may not be in fact identified, the mark is of a kind, which if permitted, can be used as an identifying device.

Kaikaus, J., of the Supreme Court, is in favour of the latter interpretation because (a) it invalidates all ballot papers which have such marks as can be used for identification and (b) it provides a simple rule and creates no difficulty in the way of the Presiding Officer and the Returning Officer. According to his Lordship, an elector is to make only one mark on the ballot paper indicating the candidate for whom he intends to vote and if, in spite of the knowledge that he is to make only one mark, he puts another mark, the ballot paper will become invalid.

Considering the argument that in that case the provision should have been differently worded, so that every mark other than that prescribed would invalidate a ballot paper instead of "any mark by which the voter can be identified", his Lordship said:-

17). Jamal Shah v. Member, Election Commission, P.L.D.1966 S.C.1.

"... it is possible to conceive of a mark which may not be used as an identifying device. It may be too insignificant. It may be accidental or the Legislature could have employed these words without coming to the conclusion whether these words could or could not be marks which were incapable of use as identifying devices" (18).

Whether a mark is one by which the elector can be identified is a question of fact and in dealing with such a situation, the Returning Officer must form the best judgement he can upon the material placed before him (19). The overriding condition for the application of the rule enunciated by this provision is evidence of pre-arrangement or design (20). In Jamal Shah's case (21), the Presiding Officer, inter alia, rejected twelve ballot papers, in which one Rupee currency note had been enclosed, one ballot paper in which part of a five Rupee note was enclosed and one ballot paper in which a coin was enclosed, on the ground that each bore a mark by which the elector could be identified. But on appeal, the learned Member, Election Commission allowed them as valid. It was contended before him that twelve ballot papers, which also bore chits with the words "bismillah ir rehman ur Rahim" (22), should also have been rejected, because by addition of the foreign matter the elector could be identified. The learned Member held that, even regarding them as a mark, such foreign objects did not, in the absence of proof of arrangement

18). Ibid, at p.61.

19). Parker, Election Agent and Returning Officer (1950) p.199.

20). Jamal Shah v. Member, Election Commission, PLD 1966 S.C.1.

21). F.L.D. 1966 S.C.1.

22). Arabic, meaning, "in the name of Allah, the Beneficent, the Merciful"

between the electors and the candidates, suffice to identify the voters. The decision was reversed by the High Court (23) but affirmed by the Supreme Court (24).

A voter or an elector, who is blind or otherwise incapacitated, may vote with the assistance of a companion (25). Under the Electoral College Act, the companion may be any person, whether an elector or not, including the Presiding Officer or one of his staff; under the National and Provincial Assemblies (Elections) Rules, 1964, an elector, a candidate or an agent will be incompetent (26). Subrule 2 of r.12 of the National and Provincial Assemblies (Elections) Act Rules further provides that the Presiding Officer must ask the person, accompanying the incapacitated elector, to mark the ballot paper in accordance with the choice of that elector and to observe the secrecy of, voting, by not divulging to any one the elector's choice of candidate.

Any interruption or obstruction, beyond the control of the Presiding Officer, will result in stoppage of the poll in an Electoral College election; in an election to the Assembly there is a further condition that the poll cannot be resumed during polling hours. In both cases the Returning Officer must be notified and a fresh poll arranged with the approval of the Chief Election Commissioner or the Election Commission, as the

23). Nasarullah Khan v. Member, Election Commission, P.L.D.1966 L850

24). Jamal Shah v. Member Election Commission, P.L.D.1966 S.C.1.

25). Electoral College Act, S.40(5); National and Provincial Assemblies (Elections) Act, S.33.

26). National and Provincial Assemblies (Elections) Rules, r.12.



as the case may be (27). All votes taken at the previous poll will be cancelled. In Md. Rashid v. Md. Shafi (28); there were temporary stoppages of the poll, firstly due to a disturbance and later under a direction from the Returning Officer. It was contended that these were in the nature of "suspensions" and not "stoppages". Reference was also made to S.27 (1) of the National and Provincial Assemblies (Elections) Act, in support of the contention that fresh election can only be held if, after the interruption or obstruction, the poll cannot be resumed during polling hours. Sajjad Ahmed and Mohammed Gul, JJ., held that -

"the above section (S.34(1) is unqualified in its terms and would cover an interruption or obstruction, whether temporary or otherwise, subject, however, to the only overriding condition that such interruption or obstruction is "for reasons beyond the control of the Presiding Officer". Once this condition is satisfied the Presiding Officer is left with no option but to stop the poll and inform the Returning Officer, who in turn is bound to order a fresh election in consultation with the Chief Election Commissioner. The provision is mandatory and admits of no exceptions. The words of the Statute are free from any ambiguity, it will not be permissible, both in principle and judicial authority, to refer to any external aid to find out the true meaning of the Statute... rather the preceptory provisions of the section are significant of the anxiety of the legislature to ensure that elections to the Electoral College are conducted in perfectly calm and orderly manner so that the electors are allowed to exercise their right of vote without any fear or pressure" (29).

27). Electoral College Act, S.34; National and Provincial Assemblies (Elections) Act, S.27.

28). P.L.D.1966 L.947.

29). Ibid at p.950.

Polling must be stopped after those persons, who are in the polling station at the time of the close of the poll waiting to vote, have cast their votes (30). Thereafter the procedure under the two Acts differs and it will be convenient to state them separately.

The Count and Result

Under the Electoral College Act, the Presiding Officer must open the ballot boxes in the presence of such contesting candidates and polling agents as may be present, and count the ballot papers; those which do not bear the official mark or are marked in a manner whereby the identity of the voter can be disclosed, are to be excluded (31); the candidate obtaining the highest number of voters is to be declared elected (32). But in the case of equality between two contesting candidates or more, the Presiding Officer should draw a lot and the candidate on whom it falls will be declared elected (33). It is important that the lot is drawn at the polling station and without undue delay (34). The Presiding Officer must prepare a "ballot paper account" showing the number of ballot papers entrusted to him; the number of ballot papers taken out of the ballot box and counted, and the number of unissued ballot papers and spoilt

30). Electoral College Act, SS.44,45; National and Provincial Assemblies (Elections) Act, SS.35.36.

31). Electoral College Act, S.45 (1).

32). Ibid, S.46.

33). Ibid, S.45 (2).

34). Abdul Aziz v. Provincial Election~~xx~~ Authority, P.L.D.1966 D608.

ballot papers and send it to the Returning Officer ~~with~~ separate sealed packets containing, inter alia, valid ballot papers received by each candidate, the invalid ballot papers in favour of each candidate, a statement showing the result of the count, unissued ballot papers, the tendered ballot papers, <sup>the</sup> marked copy of the electoral rolls, the counterfoils of the issued ballot papers, <sup>the</sup> tendered votes list and the challenged votes list (35).

After closure of the poll at an election for the Provincial or National Assembly, the ballot box or boxes, if more than one was used, are opened in the presence of the candidates, election agents and polling agents. The ballot papers received by each candidate must be counted and placed in separate packets. Ballot papers without the official mark or bearing a mark by which the elector can be identified or which are bad for uncertainty are to be excluded from the preliminary count; they must also be put in a separate packet. The Presiding Officer must prepare, inter alia, a statement showing the votes in favour of each candidate and those excluded by him. These must be sent along<sup>with</sup> the ballot paper account to the Returning Officer (36). The count is conducted by the Returning Officer, who must notify all the contesting candidates and their agents. Every reasonable facility must be provided them of watching the count; necessary information may also be given, consistently 35). Electoral College Act, S.47.

36). National and Provincial Assemblies (Elections) Act. S.36 read with r.14 of the National and Provincial Assemblies (Elections) Rules.

with the orderly conduct of the proceedings (37). The following procedure is required to be observed. The Returning Officer will open the packets containing the ballot papers, verify the correctness of the ballot paper account and examine the ballot papers excluded from the count by the Presiding Officer. A ballot paper erroneously excluded by him must be counted; the invalid ballot papers will be rejected. If a candidate or an agent objects to the rejection of a ballot paper, the Returning Officer should endorse on it the words "rejection objected to" and record his reasons therefor (38). But before a ballot paper can be rejected, reasonable opportunity should be provided to inspect it (39). The count of votes is a serious matter, on which the result of the election depends and, therefore, an appeal has been provided against any proceedings relating to the count, which necessarily includes the question of the validity of a ballot paper.

S.36 and S.38 of the National and Provincial Assemblies (Elections) Act have been interpreted by Iqbal, J., in Z.H.Lari v. Returning Officer (40). These sections deal with different matters and are devised to meet different situations. S.36 is procedural and lays down what the Presiding Officer is to do after the close of the poll; its purpose is to ensure that there

37). National and Provincial Assemblies (Elections) Act, S.37.

38). Ibid, S.38.

39). National and Provincial Assemblies (Elections) Rules, r.17.

40). P.L.D. 1966 J.13.

is no interference with the votes cast in the period between their despatch to the Returning Officer and their receipt by him. The Presiding Officer cannot reject a ballot paper but may only exclude it from the count without giving any reason for doing so; these proceedings do not confer any right nor impose any liability. On the other hand, S.38 deals with matters of substance; the Returning Officer is empowered to reject a ballot paper and, if the rejection is objected to, he must make a note of it on the ballot paper; the result is declared on the basis of the count by him and it gives a person a basis for a legal right to be declared elected. In the case cited, his Lordship even went to the extent of holding that,

"the Legislature does not seem to have intended that the procedure given in Section 36 was in respect of the count. If it had so intended, there was no reason why it should not have placed Section 36 under the heading of "count". (41). The word "count" is used more than once in S.36, but since the same was for a purpose other than the one for which it was in fact meant, the same being the declaration of the result dependent on that, the proceedings under Section 36 do not deal with the count and the fact that the Legislature did not put it under the head "count" lends support to this view. At any rate... the classification... leaves no doubt as to the fact that Section 38 is not in continuation of proceedings conducted under Section 36 of the Act." (42).

41). S.36 occurs under the marginal heading "Procedure on close of the Poll".

42). P.L.D. 1965 J.13 at p.26.

It is submitted that the view taken by the learned Judge is correct but it may be added, with respect, that the proceedings under S.36 can appropriately be described as relating to the Preliminary Count. This will not derogate from the fact that it is only the count under S.38 which will confer rights on the candidates.

Votes may be recounted by the Returning Officer, either suo motu, or on a request of the candidate or his agent (43). The Returning Officer must exercise his discretion with the greatest care and should not accede to a request which is unreasonable or intended to delay the result of the election.

The candidate receiving the highest number of votes is declared elected (44). In the event of equality of votes between two or more contesting candidates, the Returning Officer must at once refer the matter to the Election Commission and fix a fresh poll. But a fresh election must not be held if an appeal has been preferred and is pending (45).

The name of the person returned as a member of the Electoral College or the Assembly is required to be published in the Official Gazette (46). This is only a formality. The status of a returned candidate is deemed to be conferred from the time of the declaration of the result (47).

43). National and Provincial Assemblies (Elections) Act, S.38(5).

44). Ibid, S.41.

45). National and Provincial Assemblies (Elections) Act, S.40.

46). Electoral College Act, S.46(2); National and Provincial Assemblies (Elections) Act, S.41(3).

47). Ibrar Hussain v. Provincial Election Authority, RLD1965 P93;  
(continued overleaf)



A candidate, who secures less than one-eighth of the total votes cast at an election, forfeits his deposit to Government. A candidate who secures one-eighth or more of the votes is entitled to the return of his deposit at the end of the election (48).

A person elected to the Electoral College may resign his membership by giving notice to the Chief Election Commissioner (49). A strict compliance with the provisions of the section is essential. In Rahim v. Chief Election Commissioner (50) the petitioner had written his letter of resignation to the Controlling Authority instead of the Chief Election Commissioner; there was no request that it should be passed on to the latter. It was held that the letter did not comply with the requirements of S.56 of the Electoral College Act and was, therefore, of no consequence. A member of an Assembly can resign under ARTICLE 107 of the Constitution. Three conditions are laid down: (a) there should be a notice of intention to resign, (b) the notice must be in the handwriting of the member concerned and (c) it must be addressed to the Speaker (51). A letter of resignation may be revoked before it reaches its destination (52).

48). (continued) Manzurul Haq v. Controlling Authority; P.L.D.1963 S.C.652; Md.Nazir v. Bakhtiar; P.L.D.1962 L.423.

48). Electoral College Act, S.48; National and Provincial Assemblies (Elections) Act, S.42.

49). Electoral College Act, S.56 (1).

50). P.L.D.1967 L.49.

52). Fazalul Quader, A.K. v. Syed Shah Nawaz, P.L.D.1966 SC.105.

51). ARTICLE 107 (a).

52).

If a vacancy occurs in the Electoral College due to the disqualification, death or resignation of its member, the Chief Election Commissioner must notify it in the Official Gazette(53). An Election to fill up the vacancy must be held within the time specified by the Chief Election Commissioner or the Provincial Election Authority; the procedure is the same as that prescribed for the general elections to the Electoral College. A bye-election must be held to fill a vacancy in an Assembly which arises within 180 days before the term of the Assembly is due to expire (54).

The procedure in elections to seats, reserved exclusively for women under ARTICLE 169 of the Constitution, is the same as ~~that~~ for elections to general seats in the Assemblies. The procedure has been laid down in the directions issued by the Election Commission, in compliance with S.45 of the National and Provincial Assemblies (Elections) Act, (55), but as there are no points of distinction, it will not be necessary to give further details.

53). Electoral College Act, S.54 (6), S.55(2) and S.56(2).

54). Constitution of Pakistan, ART. 170 read with ART.107.

55). Directions for Elections to the seats reserved exclusively for women. The Provincial Assembly of West Pakistan Manual (1965) p. 384.

CHAPTER 6ELECTION OF THE PRESIDENTGeneral

The Constitution of 1956, under which the President was to be elected through votes of the members of the Assemblies, was short lived. After its abrogation in 1958, a Commission was set up to frame a new Constitution for Pakistan. To them the idea of electing the President through an electotal college composed of members of the Assemblies was unacceptable: the President is not responsible to them; the members could bargain with him and render him less effective in the exercise of his Constitutional powers. It was argued that in a presidential form of government, the President, being the only person at the head of the State, inextricably connected with the administration that affects the common man, it was necessary that he should command the confidence of the people; this confidence would ~~be~~ only be forthcoming, if the President were elected by them(1). As will be seen later, the recommendation was not accepted. The Franchise Commission, too, advocated direct

1). Pakistan Constitution Commission Report, 1961.

*elections but*

[thought it feasible to hold the first elections to the office of the President indirectly but by a strong electoral college(2). But ARTICLE 165(1) of the 1962 Constitution had already provided that, "an election of the office of the President shall be decided by the votes of the members of the Electoral College".

The election is by some 80,000 members of the Electoral College. After their election under the Electoral College Act and Rules, they become "electors" for the purpose of electing the President and the Assemblies. An oath is administered to every elector, inter alia, requiring him to make his choice honestly, regardless of personal gain or interest, fear or favour, affection or ill will(3). Under ARTICLE 164, the manner in which the elections are to be held and decided had to be provided by law. The Presidential Election Act, 1964 and the Presidential Election Rules, 1964 have been enacted in compliance therewith and it is with reference to the provisions contained in these statutes that the law relating to the election of the President will be described.

2). Pakistan Franchise Commission Report, 1963. The merits and demerits of the system are discussed in Chapter 1.

3). Constitution of Pakistan (1962), ART. 159 and First Schedule.

The election is conducted by the Election Commission, unless it delegates its powers and functions to one of the Members or the Chief Election Commissioner; the delegation of functions to subordinate officers must be in special circumstances only(4). To ensure that the election is conducted honestly, justly and fairly, instructions can be issued by the Election Commission(5). The election must be held within 120 days of the dissolution of the National Assembly or on the day immediately preceding the day on which the term of the office of the President is due to expire, if it falls within the period first mentioned; in any other case it must be held within 90 days from the time the President ceases to hold the office(6).

After the notification calling upon the electors to elect the President is published under S.3 of the Presidential Election Act, one assistant Returning Officer for each Province must be appointed(7). The appointment is made by the Election Commission after consultation with the President.

4). Presidential Election Act, S.4.

5). Ibid., S.43.

6). Constitution of Pakistan(1962), ART.165; Presidential Election Act, S.3.

7). Presidential Election Act, S.4(1).

It is submitted that, as the Commission should be independent of the executive, the approval of the President should not be necessary. The provision is provocative and should be amended owing to the importance of freedom of choice in these elections. The Chief Election Commissioner must himself act as the Returning Officer but his powers can be delegated to the assistant Returning Officer, in respect of all or any of his functions(8). It may be recalled that the Chief Election Commissioner is appointed by the President(9). Considering that under ARTICLE 166 the President is eligible for reelection, it is possible that the same Chief Election Commissioner, as has been appointed by the President in his discretion, may be the Returning Officer who, during his term of office, should the President offer himself for a second term, would be required to conduct the election. This anomaly in the Constitution, in the submission of Mr. Brohi, the learned author of the Fundamental Law of Pakistan, acquires a sinister significance, if regard is to be had to the provision which says that the validity of the election of the President shall not be called in question in any Court(10).

*Ibid*, S.4 read with S.2(p).

9). Constitution of Pakistan(1962), ART.147. The office of the Chief Election Commissioner has been discussed in Chapter 5.

10). The reference was to Article 32(3) of the 1956 Constitution; the corresponding provision in the 1962 Constitution is ART.171(2) which reads: "when a person has been elected as President, the validity of the election shall not be called in question in any Court or authority whatsoever".



### Qualifications and Disqualifications of Office

The candidate for the office of the President must possess all the qualifications of, and is subject to the same disqualifications as are imposed on, a member of the Assembly. These have been fully discussed and need not be repeated(11). Two further qualifications are essential: the candidate should be a Muslim and he must have attained ~~xx~~ the age of 35 years. The minimum age suggested by the Constitution Commission was 40 years, as ~~xxxx~~ had been the case under the 1956 Constitution, but 35 years is the minimum in the similar provision in the Indian Constitution(12). The word "Muslim" provoked comment from the minorities in Pakistan. Although about three per cent of the respondents to the questionnaire, issued by the Constitution Commission, were against this qualification, a small number, though not opposed to the election of a Muslim to the post, argued that the use of the word "Muslim" was unnecessary. The following observation of a member of the minority is of interest:-

"We do not mind that a Muslim should be the head of the State. As a matter of fact, a Muslim should be the head, when the percentage is overwhelmingly Muslim. But why should you safeguard it by saying that he should be a Muslim; why do you want

11). Chapter 4 on the Candidate.

12). Art. 58(1).

the protection at all. I only think that it is a question of sentiment that you have put it like that, otherwise there is no chance of a non-Muslim being chosen as head of the State"(13).

It is submitted that the decision of the Commission not to delete the word "Muslim" was correct. Pakistan is an Islamic State, so a clear provision in the Constitution that the President should be a Muslim is essential. It may be mentioned that some countries provide in their Constitutions that the head of the State should belong to a particular sect of the Christian Church, and there is nothing unusual or sinister in laying down that the head of the State should be a Muslim.

But the Constitution has, in fact, itself made an exception in this regard. Under ARTICLE 16, if for any reason the office of the President is vacant, the Speaker of the National Assembly acts as the President. Under ARTICLE 108, the Speaker is chosen from among members of the Assembly, and consequently, possesses the same qualifications as any other elected member of the National Assembly. Since being a non-Muslim is not one of the disqualifications for a candidate to the National Assembly, it is possible that the Speaker may be a member of <sup>a</sup> ~~the~~ minority religion in Pakistan. It is submitted that the intention of the framers of the Constitution was and is that only a Muslim should be the President. Perhaps it would be better if it is provided that the Speaker should also be a Muslim to remove the likelihood of any other person acting as the President under ARTICLE 16.

Under ARTICLE 166, a person who has held office as ~~a~~ President for a period of eight years is <sup>in-</sup>eligible for reelection, unless his candidature is approved by a majority of the members of the National and Provincial Assemblies present at a joint sitting. If the National Assembly is dissolved, a majority of the members of the Provincial Assemblies in a joint sitting will suffice(14). It is interesting to note that the effect of a Provincial Assembly being dissolved is not provided for. Prima facie, in such a case the President would not be eligible for reelection.

#### Nomination

An elector may, by a nomination paper, propose the name of a person, who is qualified to be elected as President. The nomination paper should be signed by the proposer and the seconder and consented to by the candidate. The candidate must declare that he is eligible and that, if elected, he will uphold the sovereignty and integrity of Pakistan and bear true allegiance to its Constitution(15). A deposit of Rs.5,000 is required; the money may be either given in cash to the Returning Officer or deposited in a Government bank

14). The procedure is the same as for the selection of the candidate (shortly to be stated).

15). Presidential Election Act, S.6.

or treasury; its receipt must be attached to the nomination paper(16). The provision is mandatory and failure to comply with it will result in the rejection of the nomination paper(17). A candidate can be nominated on more than one nomination paper but, as in the case of nomination for the Electoral College and the Assemblies, where a person subscribes to more than one nomination paper, whether as a proposer or as a seconder, the nomination paper received first in point of time is alone valid(18).

The scrutiny of nominations may be attended by the candidate, his proposer and seconder, and one other person, specially authorised in this behalf by the Returning Officer. Any of them may raise objections and demand an enquiry(19). The law provides for a summary enquiry only. A nomination paper will be rejected, if the candidate, the proposer or the seconder is not qualified or the signatures of the proposer and seconder are not genuine or if there has been a failure to comply with provisions concerning the filling up of the nomination papers or the deposit of security(20). In the case

16). Ibid., S.7.

17). Ibid., S.8(3)(d).

18). Ibid., S.6(5).

19). Ibid., S.8(1).

20). Ibid., S.8(3).

of rejection, a brief statement of reasons should be given by the Returning Officer, to facilitate the filing of an appeal(21).

Within two days of the order rejecting a nomination paper an appeal can be preferred to the Election Commission and will be heard by one of its Members(22). The manner in which the appeal would be disposed of is left entirely to the discretion of the appellate authority; he may dismiss it either summarily or after holding<sup>a</sup> summary enquiry. The decision is required to be arrived at within three days (23). It is submitted that a proper enquiry should be provided for in every case brought by way of appeal. Serious consideration of objections to nominations should be regarded as an important stage in the election. The decision of the appellate authority is final(24) and there is no further remedy by way of election petition, as in the case of elections to the Electoral College and the Assemblies.

The contesting candidate can withdraw his candidature within two days of the publication of the list of validly

(21). Ibid. S.8(4).

(22). Ibid. S.8(5); Presidential Election Rules, r.5.

(23). Presidential Election Rules, r.5(4).

(24). Presidential Election Act, S.8(5).

nominated candidates but he must inform the Returning Officer(25). The notice, which must be in writing and delivered to the Returning Officer, is irrevocable(26). A candidate may, in the same manner, retire but not within seven days of the poll(27).

The number of candidates who can ultimately contest for the presidency is fixed at three(28). This appears to be arbitrary. It is submitted that it is unlikely that a person, who has not earned a reputation and fame throughout the country by his patriotism, selfless devotion to the public service, meritorious work, calibre and ability and who has neither sufficient means nor the backing of a strong political party, can secure nomination to this high office. The number of such persons being small, the number of candidates nominated is unlikely to exceed three or four. Again, the deposit of Rs.5,000 adequately restricts the field; if the amount is not considered<sup>a</sup> sufficient deterrent, it may be doubled. At the only election yet held there were only four candidates, two of whom received little support from the electors. Be that as it may, the procedure laid down for the

25). Ibid., S.9 read with r.6(1) of the Presidential Election Rules.

26). Presidential Election Act, S.9(1) and (2).

27). Ibid., S.15.

28). Constitution of Pakistan(1962), ART.167.



election of the candidates is as follows:-

If the number of contesting candidates exceeds three, the Returning Officer must inform the Election Commission, ~~who~~ <sup>which</sup> refers the matter to the Speaker of the National Assembly. It is the latter's responsibility to convene a joint sitting of the members of the National Assembly and the Provincial Assemblies or if the National Assembly stands dissolved, of the Provincial Assemblies only and to select three candidates for the office of the President. The quorum is complete in the first case if 128 members are present; if the National Assembly stands dissolved 80 members suffice. The meeting must be presided over by the Speaker or, in his absence, by one of the members present. The proceedings must be conducted with a view to ensuring the orderly and expeditious disposal of the business, and every candidate should, as far as possible, be given equal opportunity of participating thereat and of addressing and being questioned by the electors. The person presiding over the meeting may disallow a question, which is sub judice in any Court, or which reflects upon the personal conduct of the President, a Judge of the Supreme Court or the High Court or is defamatory of or is calculated to scandalize any other candidate or is couched in offensive, abusive or vulgar language or is

irrelevant. The three candidates are to be selected by a secret ballot. The names of the three candidates, who receive the highest number of votes, will be communicated to the Election Commission(29).

Two points emerge from studying the provisions regarding the joint sitting of the members of the Assemblies. There is no provision for the constitution of a joint session, if a Provincial Assembly dissolved and how the candidates will be selected. Again, under clause 4 of ARTICLE 167, "where the person holding office as President is a candidate for election, his candidature shall be disregarded for purposes of this Article". In other words, it is not necessary for him to be present at the joint sitting to address the members and, most important, to submit to being questioned about his candidature. Does this then mean that he is to be accepted as a candidate merely because he is already in office? If so, it should have been stated that the object of the joint sitting is to select two candidates instead of three. But this would seem to be repugnant to the intendment of the Legislature. The ~~xxx~~ impression derived from reading ARTICLE 167 and S.12 together is that the three candidates are to be chosen from amongst those present at the sitting and in respect of whom voting takes place. As ARTICLE 167(2) says that a candidate may address the joint session, so presumably he is not

29). Presidential Election Act, S.12; Constitution of Pakistan(1962), ART.167.

obliged to do so. But, if no candidates appear to submit to questioning by the members, they are deprived of the criteria for making their selection. It is submitted that the provision needs to be simplified and clarified, or it should be ~~amended~~ deleted. It may also be mentioned that the system of giving members of the Assemblies the right to select the candidates is undesirable. It is submitted that it could provide the members with an opportunity to bargain with the candidates and select a President dependent on them. But taking the provisions as they are, a further question arises: Should the newly elected or the outgoing members make the selection? It is submitted that it ought to be done by the newly elected members of the Assemblies; for, at the time when the nominations are made, the representative character of the outgoing members may be diminished by the impending expiration of the term of the Assemblies; in any case, they will be less representative than the newly elected members. Lastly, it may be pointed out that the time for selection of Presidential candidates is material in an indirect system of election. The election of the President involves two stages: in the first the primary voters elect members to the Electoral College (who may be called secondary voters) and in the second the President is elected by the Electoral College. Since the secondary

voters derive their authority from the primary voters, it is desirable that the latter should know the names of the presidential candidates, when they are called upon to elect the members of the Electoral College; this would make the delegation of authority by the primary voters to the secondary ones real and effective. The law should expressly provide that the list of validly nominated candidates be published before the electors are chosen.

The election to the office of the President must normally be completed and its result declared fourteen days before the term of the ruling President is due to expire(30). If, after scrutiny and withdrawal, there remains only one validly nominated candidate, whether approved by the joint sitting or not requiring such approval, or if the candidates retire, so that only such candidate remains, he will be elected, but not before the appeal of the candidate, whose nomination paper has been rejected, has been disposed of or the time of presentation of his appeal has elapsed(31).

#### The Poll

In the case of a contested election, polling stations are constituted at suitable places(32). The date and time of the poll is fixed and notified; thirty clear days must intervene between the date of the nomination and the poll(33).

30). Constitution of Pakistan (1962), ART.165(2).

31). Presidential Election Act, S.18 read with SS.8, 9 & 15.

32). Ibid, S.23.

33). Ibid, S.14.

The hours of the poll must be fixed in advance and due notice of the programme should be given to the electors(34). Each candidate is to be assigned one of the five symbols prescribed by r.9 of the Presidential Election Rules. The name of each candidate must be prominently displayed at the polling stations(35).

A Presiding Officer is required to be appointed for each polling station. To assist him an adequate number of polling officers are also appointed. In addition, the Returning Officer may entrust a polling officer with all the powers of the Presiding Officer, while the latter is ill or, for some other reason, is unable to perform his functions(36). At the last presidential election an objection was raised by the combined opposition parties with regard to the appointment of Presiding Officers. They argued that Presiding Officers should not be appointed from amongst officers under the direct control of the executive; they should be judicial officers under the administrative control of the High Courts; if the number of such judicial officers was small, the services of the principals and professors of colleges and other educational

34). Ibid., §.26.

35). Ibid., §.19.

36). Ibid., §.23.

cational institutions <sup>should</sup> be utilized. The Election Commission did not accept this in view of a clear provision in the law that executive officers of the Government may be called upon, as of right, to assist the election machinery in the discharge of its duties, whereas the judicial officers are available by the courtesy of the High Courts. The Commission, however, promised to take extra care in the selection of presiding officers, so that only the persons with best qualifications and service record are appointed. It was also stated that every objection with regard to the suitability of an individual Presiding Officer would be carefully looked into by the Commission and it would not hesitate to reconsider the appointment (37).

As in relation to Assemblies' elections, meetings of electors may be arranged and a contesting candidate provided opportunity to address them. The purpose of these meetings is to provide an excellent opportunity to the candidates of explaining their aims and objects; they also play a significant role in influencing the electors. Such meetings in the last election of the President were not open to the public but were restricted to the members of the Electoral College, accredited representatives of the press and officials of the election authority. The reason is to be found in the following

(37). Report of the General Elections in Pakistan (1964-65), vol. 1, p. 80 read with p. 106.



words:-

"unrestricted entry of the public would have required elaborate arrangements for the maintenance of law and order. Moreover, sufficient accommodation was not likely to be available if there was to be unrestricted entry of the public to these meetings. It was feared that with mounting interest in the first Presidential election in the country, there would be an unmanageable rush at these meetings."(38).

It is submitted, with respect, that although these reasons would have been fully applicable to the conditions prevalent at the last election to the office of the President, they should not be resorted to in future. In order to win public confidence, it is essential that the entry to these meetings be unrestricted. To ensure maintenance of public order at the meetings, <sup>a</sup>law should be made to regulate their procedure.

The candidate may appoint an election agent. His authority may at any time be revoked and a new person appointed instead. If no election agent is appointed, the candidate will be deemed to be his own election agent(39). There is also a provision for the appointment of two polling agents for each candidate. They may be appointed by the candidate or his election agent but before the commencement of the poll and with notice to the Presiding Officer(40).

38) Ibid. at pp. 92, 93.

39) Presidential Election Act, S. 20.

40) Ibid. S. 21.

As against the American system of plural voting, where-  
 under there is a danger of the majority groups in the  
 electoral college combining to prevent the minority groups  
 securing the election of any any of their nominees, the system  
 of <sup>the</sup> single non transferable vote for each elector has been  
 prescribed(41). To give effect to the mandate of the Consti-  
 tution that in all elections secrecy of the ballot must be  
 observed(42), S.12 of the Presidential Election Act states that  
 the election of the candidates is to be by a secret ballot.  
 The ballot boxes are to be provided by the Election Commission.  
 As in the case of election to an Assembly, one ballot box is  
 to be used for all candidates; if it becomes full it will be  
 sealed and kept apart and another box substituted(43). The  
 duty of maintain<sup>ing</sup> order at the polling station falls on the  
 Presiding Officer and his assistants(44). The number of persons  
 admitted into the polling station, at one particular time,  
 is to be regulated and unauthorised persons excluded therefrom  
 (45). A person who misconducts himself or disobeys any lawful  
 order of the Presiding Officer must be forcibly removed from

41). Ibid., S.32(5).

42). Constitution of Pakistan(1962), ART.172.

43) Presidential Election Act, S.29.

44) Ibid., S.24(2).

45) Ibid., S.S.30.

the polling station and may not reenter without permission. But, if he is an elector, he should not be deprived of his lawful right to vote (46). Before issuing a ballot paper, the identity of the elector must be ascertained by looking at the identity card issued to him under r.11 of the Presidential Election Rules; the ballot paper should be stamped with the official mark and initialled by the Presiding Officer, although the existence of the former would be sufficient; the signature or thumb impression of the elector should be obtained on the counterfoil to indicate that he has voted (47). Arrangements are to be made by the Presiding Officer to enable an elector to mark his ballot paper in secret (48). An elector, who inadvertently spoils his ballot paper, may, on proof of inadvertence to the satisfaction of the Presiding Officer, be given a new one (49). The elector should put only the cross mark against the name of his or her choice and, after inserting the ballot paper in the box, must immediately leave the polling station (50). A blind or otherwise incapacitated elector will be

46). Ibid., S.31(1).

47). Ibid., S.32.

48). Ibid., S.29(6).

49). Ibid., S.34.

50). Ibid., S.32(3) and (4); Presidential Election Rules, rr.12 &14.

aided by a companion. It is important that the companion should not be an elector; he should mark the ballot paper strictly in accordance with the wishes of that elector; he should respect the secrecy of the ballot(51).

A fresh election is to be held if one of the contesting candidates dies before the election is completed(52). A fresh poll will be taken in case of an interruption or obstruction which is beyond the control of the Presiding Officer(53).

After the close of the poll, the Presiding Officer, at each polling Station, counts the total number of ballot papers in each ballot box in the presence of the candidates and their agents present(54). The valid ballot papers polled on favour of each candidate are counted; those which are bad for uncertainty or do not bear the official mark or bear a mark from which the identity of electors can be known must be excluded(55). The valid and the invalid ballot papers should be sealed in separate packets and sent to the Returning Officer, along with the ballot paper account, to enable him to consolidate the results received from polling stations situate in both Provinces

51). Ibid, S.33; Presidential Election Rules, r.13.

52). Presidential Election Act, S.16(1) and (2).

53). Ibid, S.27(1) and (2).

54). Ibid, S.36(1)(a).

55). Ibid, S.36(1)(b).

of Pakistan(56).Whereas under S.38 of the National and Provincial Assemblies <sup>(Election)</sup> Act,the count of votes takes place in two phases,a preliminary count by the Presiding Officer under S.36 and the "count" by the Returning Officer;it is only the count under the latter provision which confers the right to be elected.The position under the Presidential Election Act is different.The function of the Returning Officer is merely to consolidate the result received.Thus the counting by the Presiding Officer is authentic and final.There is no provision for a recount.

For consolidation of the results,the Returning Officer must give notice in writing to the candidates and their agents of the time and place for the purpose(57).If two top candidates secure the same number of votes,the Returning Officer should forthwith direct a fresh poll to be taken in respect of them(58); otherwise he should declare the candidate with the highest votes elected and publish his name in the official Gazette(59).A candidate,who has retired or failed to secure one-eighth of the total votes cast,forfeits his deposit to the State(60).

56).Ibid.S.36(3) and (5);Presidential Election Rules,rr.15 and 16.

57).Presidential Election Act,S.37(1);Presidential Election Rules, r.18(2) and Schedule,form VIII.

58).Presidential Election Act,S.37(2).

59).Ibid.S.38.

60).Ibid.S.39.

### The President Elect

It will be observed that the procedure prescribed for electing members of Assemblies applies mutatis mutandis to the election of the President. The election has, however, been placed on a higher plane. It is taken for granted that the candidates for the high and august office are above distrust and would be unlikely to apply illegal means to get elected. This explains the absence of provisions relating to the corrupt and illegal practices in the Presidential Election Act, 1964. But the matter does not rest there. According to clause 2 of ARTICLE 171 of the Pakistan Constitution, "where a person has been declared to have been elected as President, the validity of the election shall not be called in question before or by any court or authority whatsoever". There is, therefore, no provision in the Act for questioning the election of the President before an Election Tribunal or another authority. The clause, mentioned above, refers to the stage after the election. As was seen earlier, an appeal is provided against rejection of nomination, but in view of the Constitutional clause, the decision of the appellate authority would be final for all intents and purposes. Whether the Pakistan High Courts, in exercise of their extraordinary special jurisdiction conferred by ARTICLE 98 of the Constitution, would be prepared to look into a petition, to call in question <sup>the election of</sup> /of the President, is a question which will be answered in the chapter on the

Jurisdiction of Superior Courts in election matters(61). Suffice it to say that the bar to jurisdiction contained in the above-mentioned clause appears to be stronger than that concerning ~~an~~ questioning the validity of elections to the Assemblies and the Electoral College.

Even conceding that the election of the President should stand on a different footing from other elections, the Presidential Election Act is incomplete in that it does not deal with corrupt and illegal practices or the consequence of indulging in them. It is submitted that the Constitution should permit judicial review of Presidential elections. It is one thing to say that candidates for the President's office should be deemed to be persons of high integrity but another to assert that elections to that office will be fair and honest in every respect. It is submitted that foul play by an election agent, if not by the candidate himself and other irregularities at the poll, can not be totally ruled out. Provisions punishing election offences should be inserted in the Presidential Election Act. Even if it were provided that no election could be challenged on this score, punitive provisions alone would tend to ensure that elections were fairly and properly conducted. If the Constitution were amended so as to permit a Presidential election to be called in question, the



the commission of an election offence, at least if it affected the result, should be a ground for declaring the election void.

It may be pointed out that the bribery and undue influence are offences and grounds, inter alia, for declaring the election of the President in India void. The jurisdiction to hear an election petition vests in the Supreme Court; the election petition is heard by five Judges for the purpose of determining all doubts and disputes arising out of or in connection with <sup>such</sup> an election (62). A petition to avoid the election of Dr. Zakir Hussain, the reigning President of India, was presented to the Supreme Court; the grounds were extensive corrupt practices and undue influence by the executive. In 1957, the election of Dr. Radha Krishen was challenged on the ground that there had been violations of the Constitution (63). Dr. Khare, the petitioner, prayed that "grave doubts that exist in connection with the Presidential election be enquired into, resolved and decided" and that "the entire proceedings of the election be quashed as void". The petition was dismissed on the ground that Dr. Khare was not competent to bring the election petition, which, under S. 14 of the Presidential Election Act, 1952 could only be brought by a contesting candidate or by at least ten electors.

62). Constitution of India, Art. 71(1); Presidential Election Act (Ind.), S. 14 read with Supreme Court Rules, Order 37.

63). Dr. Khare, N.B. v. Election Commission, (1958) 13 E.L.R. 318.

Thus in India cases calling in question the election of the President have arisen. They could arise in Pakistan as well. It is expedient that the Constitution and the Presidential Election Act be amended in the light of what has been stated above.

The term of the elected President is five years from the date on which he entered upon his office, but, notwithstanding the expiration of his term, he may continue to hold his office until his successor enters upon the office<sup>(64)</sup>. He is eligible for reelection for any number of terms provided his candidature is approved by a joint session of the members of the National and Provincial Assemblies<sup>(65)</sup>. The maximum number of terms for which the President could remain in office was two under the late Constitution<sup>(66)</sup>, because it was considered that the continued exercise of power by one person might encourage him to concentrate his activities on successfully contesting the next election and would prevent, on grounds other than merit, other persons from stepping into the office. In the United States, by the 22nd Amendment, it was provided that, "no person shall be

64). Constitution of Pakistan(1962), Article 12(1) and (2), as amended by Constitution(Second Amendment) Act, 1964.

65). Ibid., Article 166; Presidential Election Act, SS. 11, 12 and 13.

66). Constitution of Pakistan(1956), Article 32(2).

elected for the office of the President more than twice and no person who has held the office of the President or acted as President for more than two years of the term to which some other person was elected shall be elected to the office of the President more than once". Before this amendment there was no bar against reelection. Brohi reports(67) that most of the Presidents were elected for two consecutive terms and President Roosevelt successfully contested for the third. The Indian Constitution enables its President to offer himself for reelection for any number of terms(68). Thus the Constitutions of Pakistan and India have similar provisions in this respect.

The President of Pakistan may resign his office at any time by giving a notice, in writing, to the Speaker of the National Assembly(69). The notice of resignation is not liable to cancellation.

#### Removal of the President

The Constitution also provides for his removal on the grounds of (a) physical or mental incapacity(70) and (b) gross misconduct or wilful violation of the Constitution(71). In each

67).in Fundamental Law of Pakistan(1958)p.95.

68).Constitution of India,Art.57.

69).Constitution of Pakistan(1962),ART.12(3).

70).Ibid.,ART.14.

71).Ibid.,ART.13.

case a detailed procedure is laid down. Under ARTICLE 14 a notice to move a resolution, asking for the removal of the President on grounds of his physical or mental incapacity, must be moved by at least one-third of the members of the National Assembly. The notice, which should set out particulars of the alleged incapacity, is served on the President, calling upon him to submit himself to examination by a medical board consisting of five qualified medical practitioners as follows:-

(a) senior most medical officer in the civil health service of the Centre,

(b) senior most medical officer in the medical service of Pakistan Army,

(c) senior most medical officer in the health service of the Province of East Pakistan,

(d) senior most medical officer in the health service of the Province of West Pakistan, and

(e) the person who is consultant physician to the Pakistan Army. (72).

It is submitted that the persons, enumerated above, who are to form the medical board, are administrative officers rather than specialists in ~~the~~ medical science. But the question, which the board will be called upon to consider, is whether the reigning President is mentally or physically capable of performing his functions, so persons with specialized knowledge of

(72) Constitution of Pakistan (1962), ART. 15.

medicine only should decide it. It is suggested that the board should consist of members selected by the members of the executive committee of the Pakistan College of Physicians and Surgeons, instituted under Ordinance 20 of 1962 (73).

73). Pakistan College of Physicians and Surgeons Ordinance. Its object, inter alia, is to establish a college of physicians and surgeons in Pakistan for maintaining high principles of medical profession, promoting specialists medical practice, arranging postgraduate medical training and matters ancillary thereto (Preamble and S.5). Persons holding postgraduate medical qualification with experience in teaching, research or public health, and who have attained eminence in any branch of medical science and public health are to be appointed Fellows of the College (S.4). A body of 20 members, called the Council of the College, is constituted from amongst the Fellows (S.6). The members of the Council elect a president, two vice-presidents and a treasurer (S.7). The executive committee is appointed under S.11 and consists of the president, the vice-president, the treasurer, the secretary and two members elected by the Council from amongst themselves. The executive committee exercises and performs such powers and functions of the Council, in the management of the college, as may be entrusted to it by a resolution of the Council or as the President may, in the case of emergency, require the executive committee to exercise and perform.

The resolution may not be moved before fourteen clear days have expired since the notice was given to the Speaker or later than thirty days(74).If the President does not appear before the medical board within the stipulated period of ten days or after the report of the medical board,before whom the President appeared for an examination,has been received, the resolution should be voted upon;anf if three-fourth of the members vote in favour the President would cease to hold office forthwith(75).Clause 9 of ARTICLE 14 provides a deterrent insofar as a resolution which does not obtain support of at least one-half of the members can result in the disqualification of the members who intially gave the notice to the Speaker; however this will not apply when the President himself did not submit to examination of the medical board.

The action of impeaching the President for having "wilfully violated the Constitution" or being "guilty of gross misconduct" operates as a brake on the natural disposition,inclination or desire of the President to act in a high handed and unconstitutional manner or otherwise misconduct himself.The procedure for the commencement of impeachment proceedings has been designedly made difficult:there must exist a strong case against the delinquent President,before he can be summoned to

74).Constitution of Pakistan(1962),ART.14(4).

75).Ibid.,ART.14(6),(7) and(8).

the bar of the National Assembly to answer the charge upon which the impeachment is to be based. Under ARTICLE 13, one-third of the total members of the National Assembly must combine to make a request to the Speaker of the Assembly for the commencement of the proceedings(76). This is done by a notice, giving particulars of the charge, and forwarded by the Speaker to the President(77). Although no period has been laid down in clause 3 of Article 13, during which the President should answer the notice, it is provided that the resolution may only be moved after the expiration of fourteen days <sup>from that</sup> on which notice of the resolution is communicated to the President(78). This appears to be a safeguard against hasty action. At the stage of consideration of charges against him, the President has the right to appear and be represented when making his defence, and there has to be a three-fourth majority of the total number of members of the National Assembly before a declaration that the charges have been substantiated can be constitutionally made (79). As

76). Ibid. ART. 13(1).

77). Ibid. ART. 13(2) and (3).

78). Ibid. ART. 13(4).

79). Ibid. ART. 13(5) and (6).



in the case of a resolution on the ground of incapacity of the President, if the resolution is supported by less than one-half of the members, punitive action would be taken against the members who gave the notice under ARTICLE 13(1); under clause 7 they would cease to be members of the National Assembly henceforth.

Under the United States Constitution, where a similar provision exists for the impeachment of the President (80), the only instance is that of President Johnson in 1868. But no such resolution has ever been passed. Mr. Brohi, has summed up the utility of the provision relating to impeachment in the following words:-

"(it) lies in its existence and the resort to it can only be made to punish the delinquent holder of the public office as to make an example out of him for the purpose of purifying public life in the country" (81).

### Indirect Election

That the President is indirectly elected has invited criticism from many people of Pakistan. It is submitted that in a presidential form of Government it is desirable that the election of the head of the State should be direct, no matter

80). U.S. Constitution, Art. 2, section 4.

81). Fundamental Law of Pakistan (1958) p. 97.

whether it be on the basis of universal adult suffrage or restricted franchise. Direct and indirect systems of elections to the Assemblies have been discussed in the first chapter. The view taken was in favour of a direct system of election for membership of the Assemblies; the view equally hold good for an election to the office of the President in view of the extraordinary position he occupies under the Pakistan Constitution. The problem may be seen here with particular regard to the question whether the Electoral College, as constituted under the Electoral College Act, or a special electoral college, consisting of either the members of the Assemblies or elected on another basis, should elect the President.

Under the 1956 Constitution the President was to be elected by members of the Assemblies, as is done in India even today. The objections to such a system are many. There would be a constant intrigue for the election; the Legislatures and the candidates would bargain and play into one another's hands; votes would be given under promises and expectations of recompensing the members of the Legislatures by services to them or their friends; the executive would be the mere creature of the Legislature so appointed, for he is impeachable by that body; there would be a world of intrigue, of *cabal* and of faction (82).

82). William L Martin, Presidential Electors: Let the State Legislatures Choose Them, 44 A.B.A.J. 1182.

The matter was looked into by the Pakistan Franchise Commission who gave a unanimous vote against it. It was observed that if the President, who is invested with immense powers, is to be elected by the members of the Assemblies acting jointly, those members to whom the President is not at all responsible may be in a position to bargain with him and thereby render him less effective in the exercise of his constitutional powers and even on matters of policy and principle; such a situation is not conducive to good government and smooth administration. Whereas in a parliamentary form of government, where the ministers are more powerful and the head of the State has very little discretionary power, the election by the members of the Assemblies might well be suitable; the position in the presidential form of government is altogether different. In the latter pattern of government it is clearly unsuitable and is repugnant to the underlying principle that the President, in order to be effective, must not be dependent on the Assembly members. The Commission also observed that if the President dissolved the National Assembly for any reason under ARTICLE 23 of the Constitution, he himself would cease to hold office upon the expiration of 120 days after the date of the dissolution and <sup>a</sup> general election of the members of the Assembly has to be held within 90 days thereof (83). But it may not be possible to complete the election, within 83). Constitution of Pakistan (1962), ART. 168.

the said period, and if the dissolved National Assembly cannot be reconstituted within the stipulated period, there would be no National Assembly to reelect another President within that period. This could result in a vacuum in the office of the President, which would be avoided, if the electoral college for electing the President were not composed of members of the Assemblies. It was further pointed out, when the members already have had a say in the selection of the three candidates for the presidency, it would be wrong in principle to give them any further right of electing one of their selected candidates as President. (84).

Election of the President by the members of the Electoral College is supported on the ground that the average adult in Pakistan is incapable of discriminating amongst the various candidates; his knowledge is limited to local affairs in his area; he does not possess the capacity to understand provincial and national issues to support a claim to cast his vote with a due sense of responsibility; he is incompetent to judge the suitability or otherwise of a candidate who does not belong to his area. It is said that a member of the Electoral College is of high calibre, has greater ability and deeper sense of responsibility. It is, however, significant to observe that neither

84). Pakistan Franchise Commission Report, 1963, Gazette of Pakistan Extraordinary 23rd August, 1963, p. 637ah.

the Constitution nor the Electoral College Act prescribes any educational qualification for a candidate to the Electoral College and an illiterate and ignorant adult can be elected, provided he can obtain the confidence of the majority of voters, even by his wealth and influence(85). Thus although the average adult is discarded as incompetent, a person with similar or no better qualifications is deemed capable of judging between the vario<sup>u</sup>s candidates for the presidency. It is submitted that an illiterate person may, as regards local needs, be competent to make a reasonable choice among the candidates but for the election of the President he may be as incapable as the voters who elected him to the Electoral College. It may be asked: Why not impose educational qualificatio<sup>s</sup> for members of the Electoral College? The answer is that it ~~might~~ not be possible to get enough persons to stand for election in certain electoral units; and if persons from other constituencies are allowed to stand, the main purpose of the scheme of indirect election, namely that the average adult voter can elect from among those with whom he moves and can reasonably be expected to be acquainted, would be violated. Speaking in favour of election of the President through the Electoral College, Mr. Akhtar Hussain, the then Chief Election Commissioner, observed:-

85). This has also been discussed in the Chapter on the Candidate, namely, Chapter Four.

"to vest the powers to make the choice of the President in a mass electorate will be taking a great risk.....when the supreme executive authority of the State is vested in one person, the method of his selection should ensure the best possible choice.....we consider that the Electoral College is best suited for the purpose. This College should have roots in the local administrative set up. The election will then take place in a cool and calm atmosphere and the President will be selected for his personal suitability, by people who can appreciate his capability due to their association with administration(86)".

This view, as also the other reasons given in support of the indirect election, were not shared by the majority of the Commission, who, after a careful consideration of the arguments for and against it, concluded that the election of the President should be by the citizens of Pakistan. Since in this thesis we are concerned with the law and not the system of elections, it is <sup>not</sup> desirable to discuss the merits and demerits of the system at length. The reasons given in Chapter One, concerning direct elections to the Assemblies, in the opinion of the author, apply

86). Pakistan Franchise Commission Report, 1963, per Akhtar Hussain, Contra.

with greater force to the Presidential Election under the 1962 Constitution. The overall consideration appears to be that, if the President of Pakistan is directly elected ~~electd~~ by its people, all adults will have the satisfaction of having participated in the election of the President, hold him in high esteem and acknowledge him as their leader, which consciousness in the masses, it is submitted, is essential for the proper functioning of a strong Presidential form of government. It may be mentioned that the election of the American President is often criticized and the Electoral College, which elects him, has been described as "an unnecessary, ~~confusing~~ and potentially harmful <sup>anachronism</sup> ~~anachronism~~" (87). There is in America a strong demand for amendment of the system and a call for the direct, popular, nation-wide vote for the President and Vice President. At present, every four years, the electors in each state vote for the "electors" who, in turn, elect the President and the Vice President, in the manner directed by the Legislature of such state (88). The electors are to meet in their respective states and ballot separately for the President and the Vice President, at least one of whom

87). per Kennedy of Massachusetts in "How We Elect Our President" J.F. Dolan (1956) A.B.A.J. 42: 1037.

88). United States Constitution, Art. II S. 1.



shall not be an inhabitant of their state. A signed list showing their votes is transmitted to the seat of the United States Government directed to the President of the Senate. The votes are counted in the presence of the Senate and House of Representatives. A majority of the votes of the whole number of electors appointed is necessary for election. If there is no such majority, the House of Representatives elects the President from the three candidates receiving the largest number of votes. In such an election, each state casts but a single vote, with a majority of the state's congressional delegation thus controlling the vote of the state. A majority of votes is necessary to elect, and, in the absence of such majority, the Vice-President acts as President; in the absence of a majority of vice presidential electoral votes, the Senate elects the Vice-President from the two highest candidates by simple majority vote.

Alexander Hamilton, while stressing that the election of the chief executive should be made by men "most capable of analysing the qualities adapted to the station, and acting under circumstances favourable to deliberation, and to a judicious combination of all reasons and inducements which were proper

to govern their choice,praised indirect election of the President in these words:-

"a small number of persons selected by their fellow citizens from the general mass will be most likely to possess the information and discernment requisite to such complicated investigation"  
(89)

But this no longer holds good as will be seen from the following observation:-

"the most thoroughgoing reform of the electoral system calls for the election of the President and the Vice President of the people of the United States without reliance on electoral votes,electors, or House of Representatives.The direct popular vote system is simple and comprehensible;many Americans believe they cast their votes for ~~their~~ presidential and vice-presidential candidate; this would make it so.<sup>In</sup> this system there would be no electors and no possibility of a minority President!" (90)

89).The Federalist No.68 at p.424(Lodge edition 1888).

90).Henlieu J.C.:Presidential Election Procedures:University of Cincinnati Law Review,Vol.35 winter 1966 p.1.

Estes Kefauver, another writer, has observed:-

"The chief advantage of the proposal(91) is obvious; would completely eliminate the possibility of the so called "minority President"(92) which cannot honestly be claimed for any other proposal".(93).

The learned writer while discussing the elimination of electors, which idea, according to him, is almost as old as the electoral college itself, informs us that, as soon as the two party system and popular democracy caused electors to become mere "dummies", proposed amendments in the Congress began to include and centre upon provisions for abolition of the office of elector. A Senate Committee headed by Senator Thomas Hart Benton in 1826 recommended a form of the district system, under which the people would vote directly for the President without the intervention

i.e.,  
91). Direct National Elections.

92). The term refers to a President who is elected without a majority of the popular vote although with more popular votes than any opponent.

93). Kefauver Estes, The Electoral College Law and Contemporary Problems: 27 (1962) p. 188. The other proposals were for the "district system" includes district and proportional plans aimed principally at the unit rule, the former by dividing electoral votes among districts within each state and the latter by proportioning electoral votes in each state in accordance with its popular vote.

of electors. Its report stated:-

"In the first election held under the Constitution, the people looked beyond these agents, fixed upon their candidates for President and Vice President, and took pledges from the electoral candidates to obey their will. In every subsequent election the same thing has been done. Electors, therefore, have not answered the design of their institution. They are not the independent body and superior characters which they were intended to be. They are not left to the exercise of their own judgment; on the contrary, they give their vote, or bind themselves to give it, according to the will of their constituents, in a case which requires no agency, and where the agent must be useless, if he is faithful, and dangerous if he is not". (94).

President Andrew Jackson, in his first annual message to Congress, is reported to have urged the people within the states should vote directly for the President, warning that,

"in proportion as agents to execute the will of the people are multiplied, there is danger of their wishes being frustrated. Some may be unfaithful; all are liable to err" (95).

94). Senate Select Committee, Resolutions Proposing Amendments to the Constitution of the United States, S. Rep. No. 22 19th Cong. 1st session 4 (1828).

95). Jackson Andrew, Annual Message 10, Message to Congress 8 Dec. 1829 (second edition 1835).

According to Dolan(96),

"another criticism levelled at the existing system is that it ~~prevents~~ permits electors to ignore the voters of their state. Electors are generally regarded as persons who should ignore their own desires and merely vote the preference expressed by the voters of their states. But the Constitution has never required this. Indeed, the original intent of the framers of the Constitution was just the opposite. They wanted the electors to pick the President, not the people. Gradually the system has evolved so that the electors are regarded to be morally bound (some states bind them as law as well) to cast their votes for the man to whom they are pledged".

In Pakistan, on the other hand, one of the demerits of the system of indirect elections is that the electors ignore the wishes of the voters and hence there should be a direct election. It is submitted, and indeed it has already been pointed out, that the elector in most cases is no better qualified than the adult voter and, therefore, the view taken is sustainable.

96). How We Elect Our President: (1956) A. B. A. J. 42:1037.

Finally, if the Constitution is not amended as to introduce direct elections in Pakistan, the desirability of a large Electoral College may be considered. This would meet the serious objection that a small Electoral College of approximately 80,000 members is easily approachable and encourages the commission of corrupt and illegal practices at elections. It is learnt that a proposal was made by a member of the National Assembly that the number of electoral units should be fixed at 120,000, when the Law Minister introduced a bill raising the number of members of the Assemblies (97). But, having studied the consensus of opinion in respect of indirect election, it would be better to hold a direct election to the office of the President in future.

97) Radio Pakistan News Bulletin, 8th Dec. 1967. ~~The Constitution has been amended accordingly.~~ S.4 of the Electoral College Act (as amended by S.3 of the Electoral College (Second Amendment) Act, 1967) now provides for the delimitation of each province into 60,000 electoral units. The Amending Act (17 of 1967) appeared in the Statute part of the P.L.D. in Feb. 1968.

Chapter 7MISCONDUCT AT ELECTIONS

The Constitution of Pakistan requires elections to be conducted "honestly, justly, fairly and in accordance with the laws", and so that "corrupt practices are guarded against"(1). To determine whether, and to what extent legislative effect has been given to this constitutional provision, it is desirable to see if the Pakistan electoral law makes adequate provisions for avoidance of "corrupt practices". This chapter is devoted to the study of election offences and may be conveniently classified into the following:-

(a) corrupt practices, which are mala in se, and imply guilty knowledge or intention;

(b) illegal practices, which are mala prohibita, that is to say, commission of an act that is forbidden by law, as for instance <sup>by</sup> inadvertence but without any intention to violate the law;

(c) other statutory offences relating to elections.

However, as "corrupt practices" are specifically mentioned in ARTICLE 153(4), we will be principally concerned with the former category. But a statement of law relating to categories (b) and (c) will also not be without significance.

1) Constitution of Pakistan(1962), ART.153(3).



Corrupt Practices

Bribery, personation, undue influence, the making or publishing of a false statement, concerning the personal character of a candidate, his relations or his symbol, falsely alleging that he has withdrawn his candidature, persuading a voter to refrain from voting on the ground of religion, race, caste, sect or tribe, lending or borrowing vehicles to convey electors to or from the polling stations and inducing a voter to leave without voting are corrupt practices within the meaning of Section 61 of the Electoral College Act and Section 80 of the National and Provincial Assemblies (Elections) Act. Under the National and Provincial Assemblies (Elections) Act any contravention of the provisions relating to the expenses incurred by a candidate in connection with the election, is also a corrupt practice (2); this is neither a corrupt or an illegal practice within the meaning of the Electoral College Act (3). Of these corrupt practices, "bribery", "undue influence", and "personation" are the more important being widely practised during elections in Pakistan, so it is desirable to deal first with them; decisions, both Pakistani and foreign (in so far as they are relevant) will be considered.

2) Section 80(1).

3) Saheb Mia v. Mia, P.L.D. 1966 D.439.

Bribery

Bribery is one of the most obnoxious corrupt practices. It is sometimes described as a "sale of votes". But this is not quite correct; bribery, in election law, is a comprehensive word including a number of ingredients. The Pakistan statutes have assigned it the following meaning:-

"A person is guilty of bribery, if he directly or indirectly, by himself or by another person on his behalf -

(1) receives, agrees or contracts for any gratification for voting or refraining from voting or for being a candidate, or withdrawing or retiring from an election;  
 (2) gives, offers or promises any gratification to any person -

(a) for the purpose of inducing -

(i) a person to be or to refrain from being a candidate at an election;  
 (ii) a voter (4) to vote or refrain from being a candidate at an election;  
 (iii) a candidate to withdraw or retire from an election, or

(b) for the purpose of rewarding -

(i) a person for having been or for having refrained from being a candidate at an election;  
 (ii) a voter (5) for having voted or refrained from voting at an election, or

4) An "elector" under the National and Provincial Assemblies (Elections) Act.

5) Ibid.

(iii) a candidate for having withdrawn or retired from an election"(6)

- 6) Electoral College Act, Section 63; National and Provincial Assemblies (Elections) Act, Section 82. It may be mentioned that Section 171 - B of the Pakistan Penal Code, 1868, which occurs in Chapter IX A of the Code, was introduced by Section 2 of the Election Offences and Inquiries Act, 1920; it defines bribery as under:-
- (1) "Whoever (i) gives any gratification to any person with the object of inducing him or any other person to exercise any electoral right or of rewarding any person for having exercised any such right; or (ii) gives any gratification as a reward for exercising any such right or for inducing or attempting to induce any such person to exercise any such right, commits the offence of bribery. Provided that, a declaration of public policy or promise of a public action shall not be an offence under this section.
- (2) A person who offers or agrees or offers or attempts to procure a gratification shall be deemed to give a gratification.
- (3) A person who obtains or agrees to accept or attempts to obtain a gratification shall be deemed to accept a gratification and a person who accepts a gratification as a motive for doing what he does not intend to do or as a reward for doing what he has not done, shall be deemed to have accepted the gratification as a reward." This definition is only of academic interest, because of the ones contained in the law, namely the Electoral College Act and the National and Provincial Assemblies (Elections) Act.

Subsections (1) and (2) deal with the bribery in contemplation of misconduct in relation to an election, subsection (3) with rewards for misconduct committed. Subsection (1) deals with the person who agrees to receive or accepts any kind of gratification; subsection (2) makes a person, giving, offering or promising a gratification to another person thereby "inducing" him to vote or refrain from voting to be or not to be a candidate, guilty of bribery; subsection (3) makes it an offence to reward or offer or promise any gratification by way of reward, for influencing or having influenced the decision of a voter or a candidate. It follows that the offence may be committed by any person and whether with or without the consent of the candidate or his election agent; it may be committed during or after the election; it may take the form of a gift, offer, promise or reward; both the bribe-giver and the person bribed are equally guilty.

The value of the gratification is not very material but the fact that it is small would be relevant to prove or negative a corrupt intent. It is not necessary that the person bribed should have actually received the gratification(7) or that

7) Coventary Case, (1869) 1 O'M. & H. 97. Willes, J., said, "it cannot be supposed that an offer to bribe is not as bad as the actual payment of money" (at p. 107); Malik Ghulam v. Malik Id., P.L.D. 1968 J. 26. Masud Ahmed, J., Chairman of the Election Tribunal, said, "bribery is not confined to actual giving of money, but also includes mere offer, or promise of gratification, though there be no acceptance of it" (at p. 28).

he never meant to vote(8).The word "gratification" includes money or anything the value of which is estimable in money and includes entertainment and employment for reward(9).

"Treating",though defined in the English Act(10),is not defined in the Pakistan law but would be included within the meaning of "bribery".To bring the gift,offer or promise of particular gratification within the mischief of the law,a corrupt motive or intention must be proved and each case decided on its facts.

The Indian Representation of the People Act,1951 as amended up to date,makes one distinction in its definition of bribery;it requires that the gift or offer or promise should be made by the candidate or his agent(11).So the definitions of bribery has a much wider scope in Pakistan than in India.

8)Lichfield Case,(1869) 1 O'H.& H.22.Willes,J.,said,"neither is the bribe less complete because the voter was one who never ought to have voted"(at p.29);Malik Ghulam v.Malik Md., P.L.D.1968 J.26,Masud Ahamad,Chairman of the Election Tribunal,said,"The offence of corruption is,therefore,complete....irrespective of the fact.....whether he has vote or not."(at p.28).In the last -mentioned case there was no independent or disinterested witnesses to substantiate the allegations of corrupt practice.

9)Explanation to S.63 of the Electoral College Act and S.82 of the National and Provincial Assemblies(Elections)Act.

10)Representation of the People Act,1949,S.100.The English definition of "Treating" is discussed in the latter part of this Chapter.

11)S.123(1).

According to the English Representation of the People Act, a person is guilty of bribery if he, directly or indirectly, by himself or by any other person on his behalf, gives any money or procures ~~of~~ any office in order to induce any voter to vote or refrain from voting or corruptly does any of the aforesaid acts on account of any voter having voted or refrained from voting or makes any such gift or procurement as aforesaid to or for any person in order to induce that person to procure the return of any person at an election or to vote for any voter, or if, upon or in consequence of any such gift or procurement as aforesaid, he procures or envisages, promises or endeavours to procure the return of any person at an election or the vote of any voter (12). It will be seen that this definition, though detailed, is similar to that in the Pakistan Acts insofar as it concerns the right of a voter to vote in a particular manner; not only a candidate and his agent but any other person may be guilty of bribery; the person who gives money or procures any office for the use of any voter or for the use of any other person on his behalf and the voter who directly or indirectly receives or agrees to receive the same is also guilty; if after an election any person, directly or indirectly, by himself or by his agent, receives any money or valuable consideration on account of any person having voted or refrained from voting or having

12) Representation of the People Act, 1949, Section 99(2).

induced any person to vote or to refrain from voting, he is also guilty of bribery. The definition, however, does not cover the case of a person who induces a candidate to stand or refrain from contesting, by compulsory withdrawal or retirement, which, as has been already observed, is an ingredient of bribery in the Pakistan and the Indian laws of elections. It may be pointed out that the definition in Section 99(2) of the Representation of the People Act consolidates the provisions contained in earlier statutes and takes into account judicial decisions under them. For our present study of the corrupt practice of bribery, Indian and English decisions are relevant to the extent indicated below.

Continuing with the definition of bribery, the gift, offer or promise must be for the purpose of "inducing" (a) a person to be or not to be a candidate or to withdraw or retire from the contest or (b) a voter to vote or to refrain from voting at the election. In Pyari Mohan v. Durga Sankardas (13), the Orissa High Court held that the expression "inducing to vote" is different from doing "propaganda work" for a candidate and that there must be some influence brought to bear upon the will of the voter. The same High Court, in another case, also expressed the view that the inducement to vote or refrain from voting must be in respect of a particular



candidate (14).

As regards the offer or promise which may amount to bribery the following cases are instructive.

In Swanimatha v. Ramadingam (15), the election of the respondent was impugned on the ground that he, at a public meeting, made promises of land and cattle to those who voted for him. The holding of the meeting was admitted and respondent's own witness deposed that the respondent said: "if you vote me into power, it will be good for the poor.... rich men have lots of lands. Poor people have no lands. If votes are given to us, poor people can do cultivation of lands instead of doing work for "cooly" (porter) under the rich people." In considering whether the respondent was guilty of having committed bribery, the Tribunal formulated the following five points for its guidance:-

- 1) the meeting was open to the public and not exclusively meant for poor people;
- 2) the offer was obviously meant for all poor people;
- 3) the offer was not meant for the benefit of the audience alone;
- 4) the offer was not meant by the respondent as an offer by himself in his personal capacity or for his personal property or possessions; and

14) Dharanidhra v. Pradipta, (1958) 17 E.L.R. 427.

15) (1952) 2 E.L.R. 390.

(5) the respondent said openly that he intended to carry out his policy by legislation. The Tribunal held that there was nothing wrong with the address, which was not different from what all candidates said at such meetings. It was observed:

"we are inclined to hold that the offer of land and cattle to the landless and the poor, irrespective of caste, creed, community and religion, does not constitute an offence. For giving land to the landless and improving the position of the poor in general is in line with the lessening of inequality wealth and income, which is the commonly accepted aim and object of the statesman and the Government in most democratic countries."

(16)

In Kataria Takadas v. P. Frederick (17), an offer to repair and renovate a "dargah" (a Muslim holy shrine), with the object of inducing the Muslim voters in the locality to vote in favour of that candidate, whether carried out or not, was held to constitute bribery. Similarly, a promise to construct a well with a view to inducing the villagers to vote for the canvassed candidate was held as falling within the statutory definition of bribery (18). Before the Madhya

16) Ibid at pp. 395, 396.

17) (1958) 18 E.L.R. 403.

18) Maganlal v. Hari Vishnu, (1958) 15 E.L.R. 205.

Pradesh High Court (19) the returned candidate was alleged to have, in pursuance of a demand made by the "Harijans" attended the auspicious digging ceremony of a well and promised to have a well constructed after the election. The Court declined to interfere with the order of the Tribunal on the ground that the petitioner-appellant had failed to establish the respondent had promised to give any financial help or that it was made to induce the "Harijans" to vote for her. In yet another interesting case (20), the election of the Congress candidate was challenged on the ground of large scale bribery or illegal gratification given by the Congress government to the salt merchants of the locality, for securing their support for the respondent in the coming elections. What happened was that a Minister of Health addressed a meeting at which the salt traders in the locality brought to his notice the deterioration of the salt trade in the area. A few days before the polling was to take place, the quota of salt was raised by 30 per cent. But the Court refused to upset the order of the Tribunal, which had concluded that it had not been proved that the increase was made at the instance of the respondent or that the action of the Government was for the purpose of securing votes.

19) In *Sarla Devi v. Brindera Singh*, (1959) 20 E.L.R. 275.

20) *Soowalal v. P.K. Chaudhary*, (1960) 21 E.L.R. 137.

Any gratification with the object, directly or indirectly, of inducing another candidate to withdraw is bribery as held in Ahmedmiya Sherumiya v. Chippa Ibrahim (21). In this case these candidates, the first respondent, a nominee of the Maha Gujrat, the second respondent, a congress nominee, and the third exponent, another Maha Gujrat candidate, were the contesting candidates. In order to avoid a split in the votes for the Maha Gujrat, the first and the third respondent agreed to refer to arbitration the question which of them should withdraw; the candidate who withdrew was to be paid Rs. 3,500 by the other towards his election expenses. As a result, the first respondent contested and was declared elected. In accordance with the terms of the agreement he had given a cheque for Rs. 3,500 after the arbitrators gave their decision. Before the Election Tribunal, Ahmedabad, his election was challenged on the ground that this amounted to bribery. Chagla, C.J., affirming the decision of the Election Tribunal, held that;

- (i) since payment of Rs. 3,500 was a condition upon which parties agreed that one of them should withdraw, it was difficult to regard this as an independent contract, which had nothing to do with the withdrawal, in pursuance of the award,

(11) it was, on the other hand, an inducement for the withdrawing candidate and the candidate who paid out was guilty of the corrupt practice of bribery.

In Gokulanand v. Jogesh Chandra(22), an old member of the Congress, who was not given a ticket by his party, stood as an Independent candidate but later withdrew "to avoid a triangular fight between the Socialists, the Independents, and the Congress candidates". In fact, in deciding to withdraw, he had been also influenced by a letter written by the Congress candidate and some Congressmen pledging themselves to give him full support at the next elections and to make an appeal to the Congress authorities in this regard. The Orissa High Court held that there was no offer or promise of gratification to the Independent candidate to withdraw and consequently that Congress candidate was not guilty of bribery. Barman, J., said that the promise of a seat in the future election was "a pious wish rather than a promise of gratification"(23). An allegation of payment of Rs. 1,600 to a candidate to withdraw by the returned candidate was not accepted in Sri Ram v. Md. Taqi(24) as there was no direct evidence; it was based on circumstantial evidence.

22) (1958) 18 E.L.R. 76.

23) *IBid.*, at p. 84.

24) (1953) 8 E.L.R. 139.

Election tribunals and courts have drawn a distinction between a promise which is "private" and one which relates to a "public action" (25). In the case of Radhakrishnan (26), promises given by the candidate, his agent and workers, to redress public grievance or to effect public amenities, such as hospitals, were treated as falling outside the definition of bribery. It was held that the candidate has a right and privilege to make his policies known to the electors to help them make the correct choice between different contesting candidates. The Allahbad High Court also took a similar view in observing that a promise relating to public action, which does not bring any private or personal benefit to a voter or is a declaration of public policy cannot be an offer of gratification. It was said,

"The promise for which the evidence has been given is, however, one under which no personal advantage could be obtained by any voter; the advantage was to the benefit of the whole constituency; if at all....The advantage to the constituency was also to be obtained by the respondent by using his influence in such a way that the public action of the State Government in its development, plans was to ensure

- 25) Radhakrishana v. Tarachand, (1956) 12 E.L.R. 378; Balwant Rai v. Bishan Saroop, (1958) 17 E.L.R. 101; Gangadhar Maithani v. Narendra Singh, (1958) 18 E.L.R. 124; Soowlal v. P.K. Chaudry (1959) 21 E.L.R. 137.
- 26) (1956) 12 E.L.R. 378.

to the benefit of the residents of this constituency. This means that the promise was a promise relating to a public action and was not a promise relating to any private or personal benefit to any voter." (27).

That this view is sustainable in Pakistan courts is clear from the intent of the Legislature in providing that "a declaration of public policy or a promise of public action shall not be an offence". (28).

As regards employment of voters for canvassing and payments to them, it must be <sup>un</sup>rem<sup>em</sup>bered that such employment is illegal only if it is colourable, i.e., with the oft-repeated object of inducing the voter or the candidate (29). So far as the payment is concerned, if it is commensurate with the work done in the constituency, the payment of such workers is not bribery (30).

27) Maithani v. Narendra Singh, (1958) 18 E.L.R. 124 at pp. 127-129.

28) Pakistan Penal Code, 1860, S. 171-B.

29) Akashya Narayan v. Maheshwar, (1958) 16 E.L.R. 337; Katari Takadas v. P. Frederick, (1958) 18 E.L.R. 403; Penryn Case, (1869) 1 O'M. & H. 127. In the last mentioned case, Willes, J., said, "unless the employment was colourable, unless, that is to say, it was employment only in name, and it was shown that the money was given either for doing nothing or was given in excess for the services fairly rendered by the voter, there was no bribery".

30) The decision of the Orissa High Court in Pyari Mohan v. Durga Sah~~kar~~, (1958) 14 E.L.R. 338.



"Treating", prima facie, is regarded as innocent, and when it is of the quality of mutual treating between equals or in connection with business matters, it does not constitute an election offence (31). But it will apply to the sort of treating which gives the person supplying it influence over the person treated, and secures to the former the goodwill of the latter (32). In the Breton Case<sup>(33)</sup>, Lush, J., said,

"...(it) must be connected with something which preceded the election, must be the complement of something done or existing before or calculated to influence the voter while the vote was in his power. An invitation given before to an entertainment to take place afterwards; or even promise to invite or a promise of giving entertainments after an election, which it may be supposed the voters would calculate on would be, if followed up by the treat afterwards, give to it the character of corrupt treating" (33).

Thus there must be some understanding or expectation of treating before the election. In the case cited the treat was not thought of till after the election was over and was held not to amount to a corrupt practice. The important factor is

31) Badarul Haq v. Election Tribunal, P.L.D., 1963, S.C.704; Halsbury's Laws of England (3rd edition) Vol.14 p. 381.

32) Norwich Case, (1886) 4 O'M. & H. 84.

33) (1871) 2 O'M. & H. 43 at p. 45.

whether "it was done with a corrupt design to influence the election or to obtain a vote or votes". (34) In considering whether a corrupt motive is present such circumstances as that the treating was openly done and that persons were included who were not voters must be weighed in favour of the person treating. The only case reported from Pakistan is that of Badarul Haq v. Election Tribunal (35). In that case the grounds to call in question the election of J to the National Assembly was that he had supplied tea and sweets to the electors in the meeting held some days before the election, which amounted to bribery. The meeting in question was to enable voters to get

- 34) Badmin Case, (1869) I'OM. & H. 117 - per Willes, J., at p. 123; North Norfolk Case, (1869) I'OM. & H. 236 where Blackburn, J. at p. 244 said, "But I can say that whenever a candidate or agent gives any meat or drink he does what is a foolish and imprudent thing because it becomes a question what the intention was in doing such a thing, and if a Judge who tries the case finds that the intention was to influence and affect voters, it vacates the election"; see also Coventary Case, (1869) I'OM. & H. 97; Din Dayal v. Beni Parsad, (1958) 15 E.L.R. 131; Boraj Bhusan v. Raja Anand, (1960) 22 E.L.R. 225.
- 35) P.L.D. 1963 S.C. 704. This was a case under the National and Provincial Assemblies (First Elections) Order, 1962; art. 62, which deals with bribery, is similar to the provisions under the 1964 Act.

acquainted with the candidates, who were to make their policies known through speeches. It was alleged that 300 persons, of whom 100 were voters, were served with tea and sweets by J. Two Members of the Tribunal held that the alleged treating had been proved by evidence, that it was meant for the electors, among others, and was lavish; the treating took place at a very material time, i.e. 12 days before the election; it was for the purpose of inducing the electors to vote for J. or to refrain from voting in favour of B, his rival. The third Member thought the corrupt practice had not been proved and that, in any case, merely giving two or three sweets and a cup of tea to voters at a "projection" meeting did not prove that this was done to induce the electors to vote in any particular manner; a guilty knowledge must be established separately; the entertainment offered was not excessive and it was "extremely doubtful" whether the entertainment had any continuing operation or influence on the voters who cast their votes 12 days after the entertainment was open to electors as well as non voters, the rival candidates and the candidates to the Provincial Assembly. According to the dissenting Member, treating in the case, was an isolated instance and would not be regarded as a practice. The matter went up to the East Pakistan High Court and eventually to the Supreme Court of Pakistan. The following extract from the judgment of the latter is significant, as laying down the principles applicable:-

"It was not a political meeting arranged to canvass ~~for~~ Mr. Jamalussattar alone. If that had been the case....and he had provided modest refreshment for those who appeared, it might well be thought that a small matter like that would not weigh with the voters in making their choice, particularly if equal refreshments were offered to many who are non voters, but here the occasion was one which was a substitute for the ordinary procedure of each candidate calling his own election meeting. ~~Canvassing~~ was not permitted, in the ordinary way, and the Assemblies were confined to occasion like the present, on which all the candidates appeared at the same time, and made their policies known to the electors. If on such an occasion one of the candidates should undertake to treat all these persons, there can be little question but that he would be directly influencing the voters in his favour. Moreover, the election to the National Assembly was an indirect election....the 200 non voters were themselves, very likely, members of the primary constituencies and consequently would be thought to be persons connected with voters in their midst... the fact of the presence of non voters would thus rather magnify than to minimise the effect of treating the voters." (36).

A word of caution is necessary about the thin line of demarcation that exists between bribery (in the focus of treating) and charity; whereas the former is a corrupt practice the latter is not until it ceases to be innocent. But it is difficult to ascertain <sup>where</sup>~~more~~ charity ends and bribery begins. Imminency of the election may be an important factor but the deciding factor would be the intention of the donor. As observed in the Nottingham Case (37),

"What one has got to look at is what we think is the governing principle in the mind of the man; that is to say, that if we think this was real charity, and that incidentally, as it were, he also saw and was milling and had the intention of taking advantage of the fact that there was popularity to be gained by it, and therefore that there were votes to be gained by it, that if the real governing thing in the mind was charity, that would not be illegitimate. On the other hand, if the real thing was to get popularity, to debauch the constituency...and to do it under the name and pretence of charity, why, of course, that would be bribery of a very serious nature."

In Sankre Gowda v. Harriyyappa (38), the election of the returned candidate was challenged on the ground of bribery and undue influence having prevailed throughout the constituency, thereby materially affecting the results of the election. As regards the corrupt practice of bribery, it was contended, inter alia, that two payments of Rs. 4,000 had been made to the managing committee of a High School and a hospital in exchange for votes. It was observed that though elections are not intended to prevent charity, there must be no influence on the electorate in the "guise of charity", but if the motive behind it is corrupt it is a visible form of bribery." The last observation was reiterated in Braj Bhusan v. Raja Anand (39), in which case the returned candidate was alleged to have distributed sweets to children, who joined the procession and shouted slogans in his favour. According to the Allahbad High Court the distribution of sweets was not actuated by a corrupt motive but was a "benevolent motive" not falling within the mischief of bribery. It was remarked that though this might increase the popularity of the candidate, being indirect propaganda, it had not been shown that the electors had been induced to vote or that they refrained from voting. In an earlier case (40) also, ~~where~~ the returned candidate who had

38) (1953) 9 E.L.R. 101.

39) (1960) 22 E.L.R. 225.

40) Farukhabad Case, 1 D.E.C. 383.

never made any donation before, gave Rs. 100 to Romilla Committee during the election campaign. It was held that this generosity could not be the outcome of any object but to gain votes. In the Wigan case, (41), Bowen, J., said,

"I wish to answer the suggestion that this was merely charity. Charity at election times ought to be kept by politicians in the background....In truth, I think, it will generally be found that the feeling which distributes relief to the poor at election time, though those who are distributors may not be aware of it, is really not charity, but party feeling, following in the steps of charity, wearing the steps of charity and mimicking her gait." (42)

Thus what are apparently charitable gifts may, in reality, be nothing more than a specious and subtle form of bribery, a pretext adopted to veil the corrupt purpose of gaining or securing the votes of the recipients. The question to be asked is: whether the motive behind the charity was pure? If the answer is in the negative, then the person is guilty and it matters not under what pretext, in what form, to what person, or through whose hands, the gift may be bestowed, or whether it has proved successful in giving the desired object

41) (1881) 4 O.E. & H.1.

42) Ibid. at p.14.



or not. So, Lush, J., in the Plymouth Case(43), said,

"on the other hand.....may be purely benevolent impulse, and, if this be its character, it matters not whether the recipient makes a good or a bad use of it or what its effect may be upon him"  
(44)

The evidence in regard to the offering of bribe must be conclusive against the respondent and beyond all shadow of doubt; it is not possible to come to a finding of guilty on the basis of assumptions, which may land the court in the valley of surmises(45). The reason is that a charge of bribery is a quasi criminal charge and such an allegation is to be treated, for the purpose of evidence, on the principles applicable to the trial of criminal charges. This matter will be discussed later in the chapter.

### Undue Influence

A person is guilty of a corrupt practice if he, by influence brought to bear upon the voter or candidate, induces him to vote or refrain from voting one way or other or to withdraw from the contest. This subtle form of corrupt

43) (1880) 3 O'M. & H. 107.

44) Ibid. at p. 110.

45) Md. Saeed v. Election Petitions Tribunal, P.L.D. 1957 S.C. 91 at p. 123.

practice may occur at an election in many forms and it is the purpose of our study to find out what really constitutes the offence of undue influence. The definition, appearing in the Electoral College Act and the National and Provincial Assemblies (Elections) Act, is as follows:-

"A person is guilty of undue influence if he:

(1) In order to induce or compel any person to vote or refrain from voting, or to offer himself as a candidate, or to withdraw his candidature, at an election, directly or indirectly, by himself or any other person on his behalf-

(a) makes or threatens to make use of any force, violence or restraint;

(b) inflicts or threatens to inflict any injury, damage, harm or loss;

(c) calls down or threatens to call down divine displeasure of any saint or "pir";

(d) gives or threatens to give any religious sentence; or

(e) uses any official influence or governmental patronage; or

(2) on account of any person having voted or having refrained from voting or having offered himself as a candidate or having withdrawn his candidature, does any of the acts specified in clause (1); or

(3) by abduction, duress or any fraudulent device or contrivance,-

(a) impedes or prevents the exercise of the franchise by an elector;

(b) compels, induces or prevails upon any elector to vote or refrain from voting."

(46)

The offence consists in application of force, physical or moral, or of threats or intimidation which distinguishes it from the offence of bribery already discussed. The definition is very wide; it includes all forms of physical, temporal or spiritual influence, with ~~the~~ a view to affect the free exercise of the franchise; it may be exercised by "any" person, whether directly or indirectly, and with or without the connivance of the candidate or his agent. The definition is similar to one in S.101(2) of the English Representation of the People Act, with the exception that influence brought to bear on the will of the candidate is not undue influence. In England, the use of force, violence or restraint is confined to "induce or compel that person to vote or refrain from voting or on account of that person having voted or refrained from voting" (47). The

46) Electoral College Act, S.65; National and Provincial Assemblies (Elections) Act, S.84. The expression is also defined in S.171 (c) of Pakistan Penal Code, 1860, which definition is similar to the one given in S.123(2) of the Indian Representation of People Act, 1951. It is also defined in the Contract Act, 1872 as, "where relations between parties are such that one of them is in a position to dominate the will of the other and uses the position to obtain an <sup>unfair</sup> advantage over the other; this definition has no relevance for our purpose.

47) Representation of the People Act, 1949, S.101(2)(a).

corresponding provision in the Indian Act is S.123(2) which lays down that the interference or attempt at interference with the free exercise of an electoral right must be by the candidate his election agent or a person with the consent of the candidate or his agent. The Indian definition does not mention a "fraudulent device or contrivance" specifically, as is done in the English and Pakistan Acts but, it is submitted, that if a contrivance or device interferes with the free exercise of any electoral right, it would fall within the provision. It is not possible to enumerate all the forms that such devices or contrivances may assume; as observed by Das, J., "they must perforce be <sup>as</sup> unlimited as <sup>the</sup> ingenuity of the human mind" (48).

At the outset it must be mentioned, and indeed it is clear from the use of the adjective "undue" before the word "influence", that it is not all kinds of influence which are within the mischief of the section; legitimate exercise of influence is excluded. Thus it was held that a reference to eminent leaders like the Quaide-Azam, the founder of Pakistan, and the late Liaquat Ali Khan, his lieutenant, by a candidate did not constitute the offence (49). It is only when a person has exceeded the bounds of such legitimate influence as he has right to exercise, by resorting to force, violence or restraint, exercises or

48) Radhakanta Mishra v. Nityandra Mahapatra, (1958) 19 E.L.R. 203.

49) Phool Md. v. Md. Sharif, P.L.D. 1963 J. 67.

attempts to exercise illegitimate influence, to deprive a voter of the liberty to exercise his franchise as he freely wishes that he may be said to commit this corrupt practice. Willes, J., while dealing with an allegation of bribery, made this significant observation:-

"the law can no more take away from a man who has property or who can give employment the insensible but powerful influence he has over those, whom if he has a heart he can benefit by the proper use of his wealth; then the law cannot take away his honesty, his good feeling, his courage, his looks, or any other qualities which give a man influence over his fellows. It is only the abuse of influence with which the law can deal. Influence cannot be said to be abused because it exists and operates". (50)

So, the question arises whether a particular exercise of influence is due or undue, legitimate or illegitimate. As will become

50) Lichfield Case, (1869) 1 O'M. & H. 22 at p. 28; Windsor Case, (1869) 1 O'M. & H. 1 at p. 6 that, "the mere fact of a person having influence and intentionally retaining it, is not alone evidence of unduly exercising that influence"; Radhakanta v. Nityandra, (1958) 19 E.L.R. 203, where it was held that, "it is only the abuse of influence which is prohibited under the law and amounts to undue influence".

obvious from the decisions cited hereafter, it has always presented some difficulty to the Judge trying an election matter, in which an allegation of undue influence is raised; the principle followed is to confine the decision strictly on the facts and the evidence adduced.

Before proceeding to examine the definition a short point may be made. Clause (a) of subsection (1) deals with the use of force, violence and restraint and clause (b) of the same subsection refers to the infliction or threat of injury, damage or loss. It is submitted that, although placed in separate clauses, the two provisions are complementary to each other and may be read together for the purpose of interpretation.

As regards force, restraint or threat, an attempt thereof will be culpable; an unsuccessful threat was held to be undue influence (51). The threat must, however, be serious (52) and deliberately uttered with the intention of carrying it into effect and not in a moment of anger (53), although it is immaterial whether the person using the threat had the power to carry it out (54). The actual words spoken may be highly relevant, as

51) Northallerton Case, (1869) L. O'M. & H. 167.

52) as held in the North Norfolk Case, (1869) L. O'M. & H. 236.

53) the decision of the Orissa High Court in Dharnidhar v. Prapdipta, (1958) 17 E.L.R. 427.

54) Oldham Case, (1869) 1 O'M. & H. 151 per Blackburn, J. at p. 162.

observed in Jagan Brasad v. Krishna Datt(55). In that case the election of the respondent was challenged, inter alia, on the ground that, at the instance of one B, an ex Maharaja and a ruling prince who commanded great influence among the Jat tribe, he had exercised considerable influence over the Jats of the constituency. It was alleged that at one of the public meetings B said that, whereas the people of India had been asking for a ban on the slaughter of cows, sacred to the Hindus, the Congress party and the Congress ~~prime~~ Prime Minister had turned down the request; and those who voted for the appellant, a member of the Congress party, "would go to hell". It was held that the words, "go to hell", in the context in which used, amounted to a threat or the exercise of undue influence. It may be noted that in order to bring <sup>home</sup> the offence of undue influence, it is not necessary to show that force or restraint was actually used or applied; the case of Sardul Singh v. Hukam Singh(56) is relevant in this respect. The election of the respondents 1 and 2, who were candidates set up by the Akali party for election to the House of the People from the double-member constituency, was impugned, inter alia, on the ground that they had made a systematic

55) (1959)20 E.L.R.443 at p.468.

56) (1953)6 E.L.R. 316.



appeal to the general body of Sikhs on the ground of religion, through four newspapers where they were represented as Panthic candidates(57), signifying thereby that they solely stood for the interest and welfare of the Sikh community and religion; the petitioner contended that to vote for him, a Congress candidate, was represented as an act of sacrilege and this amounted to the exercise of undue influence. It was held that there was no undue influence, as it could not be said that the persons addressed were made made to believe that non compliance would be irregular or sinful. During the course of the decision it was observed that it is not necessary that there must be any actual threat or physical compulsion held out but the method of inducement adopted must convey to the mind of the person addressed that non-compliance with the wishes of the person offering the inducement may result in physical or spiritual harm to himself or to any other person in whom that person may be interested.

Regarding what is harm or loss in the context of undue influence, Blackburn, J., said,

"suppose.....the case of a person who is in the habit, at intervals, of frequenting a shop and giving the tradesman some custom; if he chose no longer to give the custom but to take away that custom and go elsewhere, is that a loss or not? I think if the

57) The word "pantha" has a religious sanctity for the Sikhs.

loss proposed to be inflicted were to such an extent and in such a way as would seriously affect the saleable value of the goodwill of the man's business, it would clearly be a loss."(58)

It was also observed that harm or loss would apply to cases where, though a person has a perfect right to do it, he does not do it with the motive of affecting the vote, yet the doing of it does inflict harm upon the other side. In the Westbury Case(59), proof of a manufacturer having exercised coercion on a large scale, in order to force his employees to vote, was considered an infliction of damage or loss in the context of undue influence. In the Oldham Case (60), Blackburn, J., held that, though the loss and harm to be done to a man may not be an illegal harm, not a matter that would be a crime like treating a voter or destroying his property, yet, if it be a loss inflicted for the purpose of affecting the vote, it would constitute an exercise of undue influence.

In Pakistan, a person is also guilty of undue influence if, by abduction, duress or any fraudulent device or contrivance, he impedes or prevents the exercise of free franchise or compels

58) North Norfolk Case, (1869) 1 O'M. & H. 236 at p. 241.

59) (1869) 1 O' M. & H. 47.

60) (1869) 1 O' M. & H. 151.

induces or prevails upon any voter to vote or refrain from voting(61).The corresponding provision in the English Act is similarly worded(62).Abduction is not defined in the election law but under the Pakistan Penal Code a person is said to abduct when he by force,compulsion or by any "deceitful means" induces any person to go from one place to another;in the present context this must be done to impede free exercise of franchise.Abduction would itself be a fraudulent device or contrivance and so would duress.In the Lichfield Case(63),it was contended that two voters were abducted on the day of the election by respondent's election agent;the election was set aside.

The words "contrivance" and "device" are qualified by the word "fraudulent",so it would be necessary to establish a fraudulent intent.The only case on the point,in Pakistan,is Haji Khan v.Election Tribunal(64).The undue influence was alleged in the following manner.An agreement was reached between the candidates that the lady voters would not vote.Accordingly, not a single woman cast her vote at that electoral unit.The

61)Electoral College Act,S.65(3),National and Provincial Assemblies(Elections)Act,S.84(3).

62)Representation of the People Act,1949,S.101(2)(b).

63)(1880)3 O' M.& H.136.

64)P.L.D.1966 K.312.

Election Tribunal held that this constituted undue influence within the meaning of S.65(3) of the Electoral College Act but the High Court reversed the order. Anwarul Haq, J., said:-

"in the present case there is no evidence that the agreement was fraudulent in any manner; on the contrary, it may be purely honest agreement based upon the social scruples of the contesting candidates to prevent their women folk from appearing at the polls." (65)

The use of the word "any" in the clause under discussion signifies that the devices or contrivances may be innumerable. For instance, in the North Louth Case (66) a number of voters, who could read and write, were induced to vote as illiterates and so to disclose unnecessarily the name of the candidate for whom they voted. In the Stepney Case (67), a yellow card was sent to every voter containing the polling hours, the voter's name and register number and the words, "to secure the return of Mr. I, poll early, and mark your voting paper as below". Then followed a copy of the ballot paper showing the petitioner's name in

65) Ibid. at pp. 313, 314.

66) (1911) 6 O'M. & H. 103.

67) (1886) 4 O'M. & H. 34 at p. 56

large type and a "cross mark" against it. At the end were the words: "be careful not to sign your voting papers, nor make any other mark except the cross as shown above or your vote will be lost". The question was whether the circulation of this document was sufficient to disqualify the petitioner as having been guilty of an act deliberately committed in order to trick the voters. Denam, J., held that this did not establish that some elector or electors had been actually deprived of their liberty of choice thereby. But, in similar circumstances, Blackburn, J., observed that,

"It was immaterial whether any voter had actually been influenced by the card in question. The real question is what was the effect likely to be produced and if I came to the conclusion that those who issued the card intended to trick the people into putting no mark for Robinson (the other candidate), for fear that it should invalidate their votes, that I suppose would be a fraudulent device" (68)

In Bishwanath v. Hira Lal (69), the appellant used the tricolour flag of ~~the~~ Congress in his election campaign, alleging that he had been selected by Mr. Nehru (the late Indian Prime Minister) and thereby was able to secure the support of many electors.

68) Gloucester Case, (1873) 2 O'M. & H. 59 at p. 61.

69) (1958) 16 E.L.R. 405.

It was held that, though the voters might have thought he was a Congress candidate, the mere fact that a candidate and his agent who did not belong to the Congress party, were moving in a Jeep flying the Congress flag, is not undue influence. Similarly, inducement to vote by wrongly imputing statements to leaders like Mohatama Gandhi, which they have not made, have been held by the Assam High Court not to amount to undue influence(70). It may be recalled that the Indian Act does not contain the words "fraudulent device or contrivance" but these cases may be cited in Pakistan as instances of a fraudulent device, although not necessarily with the same result.

#### Forms of Undue Influence

Undue influence can take many forms such as influence exercised by a landlord or "zamindar" on his tenants(71) or employer over his employees(72), a tradesman over his customer(73).

70) Ghayyur Ali v. Kheslav, (1958) 16 E.L.R. 155.

71) Noth Norfolk Case, (1869) 1 O'M. & H. 236; Galway Case, (1869)

1 O' M. & H. 303; Windsor Case, (1874) 2 D' M. & H. 88.

72) Blackburn Case, (1869) 1 O'M. & H. 198; Oldham Case, (1869) 1 O' M. & H. 151; Westbury Case, (1869) 1 O'M. & H. 47.

73) North Durham Case, (1874) 2 O'M. & H. 251 152.

a priest or a "Mullah" over his congregation(74).In the North Norfolk Case(75),Chad,the proprietor of a large agricultural estate in the district had canvassed for respondent's agent among his tenants.Blackburn,J.,observed that,although a landlord has a perfect right to choose his tenants or evict them,if the landlord threatens to evict or does evict any of his tenants for his refusal to vote in the manner indicated by him,it amounts to undue influence.In the Westbury Case(76) it was proved that the manufacturer told his workmen that no workman should remain in his employment who voted for the petitioner(who was rival in his trade).The men told him that they did not intend to vote at all.He commended their resolution and extracted a promise from them that they would adhere to it. Later some of the men changed their minds and were obliged to leave his employment in consequence of their refusal to abstain from voting.It was held that the dismissal was for political reasons and,therefore,he was guilty of exercising undue influence

74)Ram Dyal v. Sant Lal,(1959)20 E.L.R.482;Muzaffarnagar Case, 2 Jagat Narain 120;Ferozepur Case,Khanna's Election Cases, Vol.ii p.187;Malik Barkat Ali Case,Hammond Election Cases p. 469;Longford Case,(1870)20 M&H 31;Galway Case,(1869)1 M&H 303;Galway Case,(1872)2 M&H 46;Tipperary Case,(1870)2 M&H 31;Southern Division of Meath Case,(1892)4 M&H 130; North Division of Meath Case,(1892)4 M&H 185.

75)(1879)1 M&H 236.

76)(1869)1 M&H 47.



The following observation of Willes, J., is interesting:-

"though in some sense they might have gone voluntarily and willingly, they did not go willingly, any more than a man acts willingly when he voluntarily takes to a small boat in the middle of the ocean when his ship is on fire. There was a compulsion upon these men, which they could not resist, and I am satisfied that ~~if these men had been told that the cards were intended to trick them~~ all these men would have remained in the employment of the respondent but for their having promised to vote for the petitioner or if they had changed their minds as willed and had voted for the respondents" (77).

It is submitted that the observation will apply even in the case of a workman who ill-treats another or causes his dismissal from their place of common employment for political reasons.

There is no reason why a customer should not deal exclusively with a tradesman or his political views. But where friendly relations have existed between the customer and the tradesman and each is satisfied with the other's performance, it will be highly questionable, if they should suddenly fall out and part company, because they do not hold the same political opinions. (78)

77) Ibid. at p. 51.

78) so held by Bramwell, J., in the North ~~Durham~~ Case, (1874)  
2 O'M. & H. 152.

A religious leader has the right freely to express his opinion on the comparative merits of the contesting candidates but it is doubtful if he can exercise his influence in favour of any ~~political~~ particular candidate by canvassing voters and others for him. According to the Indian Supreme Court such a ~~xx~~ course of conduct on his part will not only be a use of great influence among a particular section of of the voters in the constituency; but it will amount to an abuse of his great influence, if the words he uses in a document or utters in his speech, leave no choice to the persons addressed by him in the exercise of their electoral rights (79). In this case the influence had been exercised by a spiritual head of the Sikhs; in the course of the judgment, Sinha, J., observed:-

"if the religious head had merely said that he preferred the appellant to the other candidate, because in his opinion he was more worthy of the confidence of the electors for certain reasons, good, bad or indifferent, and addressed words to that effect to the persons who were amenable to his influence, he would be within his rights and his influence, however, great could not be said to have been misused". (80).

79) ~~Sant Lal v. Ram Dial~~ Sant Lal v. Ram Dial, (1959) 20 E.L.R. 482.

80) Ibid. at p. 492.

In the Muzaffar Nagar Case(81), a "moulvi" arrived on horseback at a polling station heading a procession which included a flag bearer and announced to the assembled voters that those who voted for the petitioner would become "kafirs" (non-Muslims); it was held that this was clearly undue influence. A different decision was arrived at in the Feozepur Case(82), which had these distinctive facts. The "ulemas" of different places issued a "fatwa" that "mirzais" (Ahmediyas) were not true Muslims and should not be their representatives. The petitioner, a "mirzai", alleged that this "fatwa" had been widely circulated and even pleaded by some "moulvis" in the polling station. It was held that in saying that "mirzais" had no concern with Muslims and were ~~en~~ inimical to them, the "fatwa" did not transgress the limits of the legitimate advice. In Malik Barkat v. Moharram Ali(83), the election had been challenged on the ground that the respondent had used the influence of "pirs" (Muslim saints) who had issued instructions asking people to vote for the respondent. It was contended that although there was no actual threat by the issue of these instructions, a fear had been cast

81) Khanna's Election Cases, Vol. II p. 205.

82) Khanna's Election Cases, Vol. II p. 187.

83) Hammond's Election Cases p. 469.

on the minds of the followers that if they did not vote for the respondent they would commit a sin. The argument was repelled on the ground that the question of what the persons addressed thought is a secondary one and does not arise if no corrupt intention is ~~shown~~ shown on the part of the "pirs".

With regard to the scope of a Catholic priest's right to canvass at the election, the following observation of Fitzgerald, J., is noteworthy:-

"the priest may counsel, advise, recommend, entreat, and point out the true line of moral duty, and explain why one candidate should be preferred to another, and may, if he thinks fit, throw the whole weight of his character into the scale; but he may not appeal to the fears or terrors of superstition of those he addresses. He must not hold out hopes of reward here or hereafter and he must not use threats or temporal injury or of disadvantage or of punishment hereafter". (84)

It follows that clergymen may legitimately address the congregation upon the conflicting claims of the candidates. Because of the high position they are capable of exerting great influence on the voters and the Judges must regard the same with extreme jealousy and seek by the utmost vigilance to keep it within proper bounds. It is advisable that a clergyman should not hold

hope of  
 out/reward hereafter or threaten to excommunicate, to withhold  
 sacraments, or to denounce the voting for any particular candidate  
 as a sin. It may be mentioned that Muslims have no regular priests  
 like Christians. The spiritual influence may be exercised by men  
 who pursue the usual avocations but have some standing in  
 society. If Maulana Maudoodi, Amir-e-Jamat-e-Islam, and an "alim"  
 wield considerable influence, the same was true of the "mullahs",  
 "pirs" and religious scholars. In Sardul Singh v. Hukam Singh (85),  
 an editor of a religious newspaper and magazine was held to be  
 such a person, so also a layman for whose opinion the community  
 had great regard (86). The limitations imposed on the exhorta-  
 tions of the priest apply with equal force to such people. It  
 should be noted that a person who threatens to impose a religious  
 penalty is specifically included in the definition of "undue  
 influence in the Pakistan statutes (87); to call down or threaten  
 to call down the divine displeasure of a saint or a "pir" is  
 an offence by itself (88). It is, moreover, a distinct corrupt  
 practice to call upon or persuade any person to vote or refrain  
 xxxxxxxxxxxxxxxxxxxx from voting for any candidate on the ground  
 of religion (89).

85) (1953) 6 E.L.R. 316.

86) Amritsar City Mohammedan Constituency Case, 1 D.I.E.C. 276.

87) Electoral College Act, S. 65(1)(d); National and Provincial  
 Assemblies (Elections) Act, S. 84(1)(d).

88 and 89) Please see overleaf.

From the above discussion we conceive that the legitimate exercise of spiritual influence is permissible and it is only the abuse of such influence, actuated by a corrupt motive or intent to affect the decision of a candidate or a voter, that is culpable. It is suggested that such influence should be altogether avoided or exercised subject to restraint. In any case, candidates must take extra care in invoking the aid of spiritual leaders and the spiritual leaders themselves, on the other hand, before addressing their followers, should consider very carefully the effect ~~of~~ their words would have upon each and every section of such followers.

Although government officials are at liberty to hold their opinions about the merits of a candidate, they must unequivocally be directed to remain aloof from politics. They must observe great care that their personal views are not voiced, expressed or given in such a manner or under

88) Electoral College Act, S.65(1)(c); National and Provincial Assemblies (Elections) Act, S.84(1)(c). In the English Representation of the People Act, 1949, this would be covered by the expression "inflicts or threatens to inflict..... spiritual injury, damage or loss" (S.104(a)). The corresponding provision in the Indian Representation of the People Act, 1951 is S.123(2), which makes it an offence to induce a candidate or an elector to believe what he or any other person in whom he is interested, will become or be rendered an object of divine displeasure or spiritual censure.

89) Electoral College Act, S.61(3); National and Provincial Assemblies (Elections) Act, S.80(4).

circumstances as might invest them with official authority. While speaking on the importance of free elections in a democratic country, the then Prime Minister of Pakistan, in his speech at Lahore in December 1955, observed:-

"no matter how discreet it looked, any form of official influence in elections amounted to a form of corruption or distortion of public morals and of lowering the standard of society in general. Every public servant has been appointed to serve the public and those duties do not include the exercise of influence on behalf of a particular party".

He said, that although some politicians would make approaches and would suggest seemingly innocent and discreet methods of using their influence, the officials would desist from doing it. ~~It was suggested that official~~ The Electoral Reforms Commission was strongly of the view that every kind of official influence must be excluded at the time of election. It was suggested that officials should not be allowed to canvass or otherwise interfere or use their influence in connection with or take part in elections to the legislative bodies, except by way of freely exercising their rights to vote and, even in this respect, they must be enjoined not to give any indication of the manner in which they purpose to vote or may have vote (90).



The use of "Official influence" or "governmental patronage" is undue influence under the Electoral College Act and the National and Provincial Assemblies(Elections)Act(91).These provisions are to be commended for their stringency;direct or indirect official influence or interference,whether at the instance of the candidate or not,is deemed a corrupt practice.

But reference may be made to the recent decision of the East Pakistan High Court in Ayeb Ali v. Election Tribunal(92), which is the only case reported at the time of writing;the allegation of official interference was under these circumstances. The petitioner and respondent no.4 were candidates for election to the Electoral College from district Lyallpur.The petitioner obtained 274 votes,as against the respondent's 216,and was declared elected.The said respondent filed an election petition, inter alia,on the ground that the circle cum Returning Officer, who was joined as respondent no.3 to the petition,and his wife had used undue influence in favour of the petitioner;the tribunal set aside the election.Before the High Court it was contended that the order of the tribunal,setting aside the petitioner's election,was based on no evidence and should be quashed;this

91)Electoral College Act,S.65(1)(e);N.& P.A.(Elections)Act,S.84  
92)P.L.D.1968 D.138. (1)(e)

submission was accepted by the High Court. During the course of the decision, Salahuddin Ahmed, J., observed:-

"There was nothing wrong with the part of the circle officer and his wife to exercise their right of franchise in participating in the election in question. There is no legal bar to such participation and in view of the fact that votes were cast by secret ballot, the casting of votes by the circle officer and his wife could not possibly have created any undue influence in favour of any of the candidates at the said election"(93)

The decision does not alter the position already stated. It is submitted that, if the petitioner-respondent had been able to substantiate the allegations in his petition before the Tribunal, the decision of the High Court would have been otherwise.

### Personation

Personation comprehends the assumption of false identity at the polls. The offence is perhaps as old as elections themselves and to prevent its commission has been one of the main objects of election law. The safeguard provided, inter alia, include a duty imposed on the Presiding Officer to put questions to a voter to establish his identity before issuing a ballot

93) Ibid., at p. 142.

paper, the right of a candidate or his election or polling agent to challenge any person claiming the right to vote and the power of a officer at a polling station to put an indelible mark on one particular finger of a voter, to prevent him from voting more than once, and the issue of identity cards to voters. Although personation is very rarely reported in the English parliamentary elections, so that this offence may be taken to be almost extinct ~~from~~ in that country, it is widely prevalent in India and Pakistan. However, the Representation of the People Act, 1949 still retains it as a corrupt practice in England. It is provided:-

"(2) A person shall be guilty of personation at a parliamentary or local election if he-

(a) votes in person or by post as some other person, whether as an elector or as a proxy, and whether that person is living or is a fictitious person; or

(b) votes in person or by post as proxy-

(i) for a person who has a reasonable ground for supposing to be dead or to be a fictitious person; or

(ii) when he believes or has reasonable grounds for supposing that his appointment as a proxy is no longer in force."

(3) For the purpose of this section, a person who has applied for a ballot paper for the purpose of voting in person or who marked, whether validly or not, and

returned a ballot paper issued for the purpose of voting by post shall be deemed to have voted."(94)

In other words, to apply for a ballot paper in the name of some other person, whether living, dead or unqualified to vote is an offence. The law has taken care to provide that in case of a person voting by post, the mere marking of the ballot paper by him is not an offence; but it will be the moment he posts it. Moreover, a person who abets the commission of personation must receive the same punishment as the person who actually commits the offence. It may be mentioned that, prima facie, knowledge, motive and intent are not the ingredients of the section but the definition of the offence, it is submitted, necessarily involves the question of corrupt motive or intent; and knowledge may be relevant to prove it.

A somewhat similar definition appears in the Pakistan electoral law and may be reproduced in extenso, for convenience of reference and interpretation. It is provided:-

"A person is guilty of personation if he votes or applies for a ballot paper, whether that person is living or dead or fictitious."(95)

The provision requires that a person should have (a) applied for a ballot paper, (b) with the knowledge that he is not the voter on whose behalf he wishes to vote and (c) with intent

94) Representation of the People Act, 1949, S.47.

95) Electoral College Act, S.64; National and Provincial Assemblies (Elections) Act, S.83.

to actually vote. Thus a person, who innocently applies for a ballot paper, possibly due to an error of print or other mistakes in the electoral roll, cannot be guilty of the offence. Similarly, a person who wilfully applies for a ballot paper in the name of another, but after its receipt, leaves the polling station without casting his vote will, prima facie, be not within the mischief of the section.

The consensus of judicial opinion is that mens rea should be deemed an essential ingredient in a case of personation, and it will be necessary to prove that a corrupt intent was present when the ballot paper was applied for and/or cast. (96). The leading case on the point is the Stepney Case (97); the borough had been divided into two divisions. A voter who had been ~~registered~~ registered in both, voted twice in the belief that he was entitled to do so; it was held that he had not committed the offence of personation. Denman, J., observed:-

".....unless there be corruption, and a bad mind and intention in personating

96) Stepney Case, (1886) 4 O'M. & H. 34; Athlone Case, (1880) 3 O'M. & H. 57; Gloucester Case, (1873) 2 O'M. & H. 59; Gounder Subaraya v. Palaniswami, (1955) 11 E.L.R. 251; Linge Gowdia v. Shivanjappa, (1953) 6 E.L.R. 288; Shankra Pandia v. V.V. Ramaswami, (1953) 5 E.L.R. 417.

97) (1886) 4 O'M. & H. 34.

it is not an offence.If it be done under an honest belief that the voter is properly there for the purpose of voting.....no offence has been committed"(98)

In India, personation ceased to be a corrupt practice with the coming into force of the Representation of the People(Second Amendment) Act, 1956 (99). The Indian Conduct of Election Rules, 1961, require an elector to allow his forefinger to be examined by a presiding officer or the polling officer to enable him to put an indelible ink mark on it(1); r.36 provides that a polling agent may challenge the identity of a person who claims to be a particular voter on depositing Rs.200.00 with the Presiding Officer; under r.35 the presiding officer is empowered to employ such persons as can assist him in the identification of the electors; in cases where identity cards are issued to electors they must be examined. These are the safeguards against personation, although it must be observed that of all these the only effective check would be the production of identity cards; but they are not issued to all the electors but only to notified constituencies in municipal areas(2). The rule authorising the issue of identity cards can, however, be easily avoided as

98) Ibid. at p.46.

99) Act 27 of 1956.

1) r.37.

2) (Indian) Registration of Electors Rules, 1960, r.28.

will, appear from the following proviso appended to it:-

"Provided that if the elector refuses to or avoids to have the photograph taken or cannot be found at his residence by the official photographer in spite of repeated attempts, no such identity card shall be prepared for the elector and a notice of such refusal or evasion or that the elector could not be found at his residence in spite of repeated attempts shall be made in the copy of the roll ~~was~~ maintained by the Registration Officer."

Thus, the safeguards are not sufficient to rule out personation in India. Similar safeguards, like the challenge of the voter and the production of identity cards issued to members of the Pakistan Electoral College are provided in the Pakistan electoral law but it was considered desirable to make personation one of the corrupt practices. Similarly, in England, although personation is very rarely practised in elections, it is an electoral offence. The deletion of the provision from the Indian Act is to be regretted. It may, however, be mentioned, that caselaw under the Act, as originally enacted, will be relevant in Pakistan. Cases of personation have been reported under the present election law in Pakistan, in one of which, Zakaur Rehman v. Salahuddin(4)

3) See chapter 5 of the thesis, on the Elections.

4) P.L.D. 1966 J. 109.

at an election to the National Assembly of Pakistan, a voter was alleged to have voted in the name of his deceased father. But none of these cases is relevant for our present purposes as they do not provide a judicial interpretation of the definition of "personation"; in the case cited the tribunal dismissed the petition on the short ground that the petitioner had failed to allege that personation took place at the instance of the respondent, which is essential if the election is to be set aside(5).

Finally, it may be pointed out that personation is not merely a corrupt practice but also a criminal offence within the meaning of S.171-D of the Pakistan Penal Code. The provision reads as follows:-

"Whoever at an election applies for a voting paper or votes in the name of any other person, whether living, dead or in a fictitious name, or who having voted once at such election, applies at the same election for a voting paper in his own name, and whoever abets, procures or attempts to procure the voting by any person in any such manner, commits the offence of personation at an election."

The definition is strikingly similar to that in the English Representation of the People Act and more lucid than that contained in the Electoral College Act and the National and Provincial Assemblies (Elections) Act in Pakistan. But as the 5) N. & P. A. (Elections) Act, S. 72: discussed in Chapter 8.



Acts last mentioned are special laws, applicable to elections to the Electoral College and Assemblies, it is unlikely that personation at elections to these bodies will be charged under the Penal Code.

#### Other Corrupt Practices

The remaining corrupt practices(6) may be briefly examined now. S.61(2) of the Electoral College Act and S.80(3) of the National and Provincial Assemblies(Elections)Act declare that a person will be guilty of corrupt practice if he-

"makes or publishes a false statement:

(a) concerning the personal character or conduct of a candidate or his relation(7) calculated to adversely affect the election of such candidate or for the purpose of promoting or procuring the election of another candidate, unless he proves he had reasonable grounds for believing, and did believe, the statement to be true;

(b) relating to the symbol of the candidate whether or not such symbol has been allocated to such candidate; or

(c) regarding the withdrawal of a candidate".

It will be observed that a statement must be made or published; it must be false; it must relate to the personal character of a

6) Except the one relating to excessive election expenses, which is important and is discussed at some length later in the chapter.

7) The inclusion of a "relation" of the candidate is peculiar to the Pakistan election law and is probably due to the close family system, where a person may be identified on the basis of his relationship with another person, without having a distinct identity of his own.

candidate or his relation; it should be calculated to affect adversely his election. But where the maker or publisher has reasonable grounds for making or publishing the statement, he does not commit the offence; if the statement relates to the symbol or withdrawal of a candidate the falsity of the statement need only be established. The law does not prohibit other sorts of criticism at candidates.

Adverse criticism, however indignified or ill-mannered, however regrettable it might be in the interest of purity and democracy of public life, in relation to political views, position, reputation or action of a candidate, is permissible, so long as it does not tend to affect the personal character of a candidate or his relation. The Bombay High Court has observed that in such matters the court cannot judge the statements in the light of their decency or desirability in so far as they are political statements not calculated to attack the personal character or conduct of a rival candidate(8). In the North Louth Case(9), Gibson, J., has observed that, a politician may be criticised for his public conduct but when the man beneath the politician has his purity assailed, he would have a right to demand that his constituents should not be poised against him by false statements.

8) Sudhir Laxman v. S. A. Dinga, (1958) 17 E. L. R. 373.

9) (1911) 6 O. M. & H. 103.

While considering S.123(4) of the Indian Representation of the People Act, the view taken in India is that criticism of political conduct and activities of a candidate do not fall within the ambit of the subsection(10). A fortiori, false allegations against a political party, its activities and workers are not within the mischief of the law.

What kind of statement relates to the personal character or conduct of a candidate (or his relation) may be observed from the decision in Madan Singh v. Ladhu Ram (11). In that case a political poster showed a bearded Rajput, whipping a tenant tied to a tree, under the orders of another Rajput Sardar with a turban, wearing a typical 'achkin' (long coat) with a sword, while the tenant's wife lay at his foot praying for mercy. The poster was circulated in some districts (constituencies) and the petitioner, who was a Rajput "Jagirdar" (landowner) and a candidate for election contended that this amounted to publishing a false statement relating to his personal character and conduct. But it was held that this caricature was of a typical Rajput, and not of the petitioner, so its publication did not constitute a

10) Dharnidhar v. Prapdipta, (1958) 17 E.L.R. 427; Mast Ram v. Bhal Singh, (1955) 12 E.L.R. 34. S.123(4) of the Indian Representation of the People Act provides: "The publication by a candidate or his election agent of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election, is a corrupt practice".

11) (1955) 11 E.L.R. 99.

a corrupt practice.

In England, the law on the subject is contained in S.91 of the Representation of the People Act; but it is an illegal and not a corrupt practice. The definition is similar to that given in Pakistan: the false statement must be a statement of fact; must be in relation to the personal character or conduct of a candidate; must be for the purpose of effecting the return of that candidate at the election. It is further provided that the offence may be committed before or during the election; it can be committed by a body corporate. Although the latter two ingredients are not specifically set out in the Pakistan Acts, under the General Clauses Act, a "person" includes a body corporate and it is unlikely that courts will accept as a defence the fact that the act was committed before the election.

S.61(4) of the Electoral College Act and S.80(5) of the National and Provincial Assemblies (Elections) Act discourages and prohibits the use of any kind of vehicle or vessel with a view to conveying voters to or from the polling station, by making it a corrupt practice. The provision, however, is not couched in absolute terms and readily admits of two exceptions (shortly to be stated). A number of ingredients, however, must be satisfied before the provision can be applied. For facility of

reference the provision is reproduced hereunder:-

"A person is guilty of corrupt practice if he-

1).....

2).....

3).....

4).....

5) knowingly, in order to support or oppose a candidate lets, lends, employs, hires, borrows or uses any vehicle or vessel for the purpose of conveying a voter to or from the polling station except when-

(A) a person conveys himself or any member of the household to which he belongs to or from the polling station or

(b) a voter conveys himself or several voters convey themselves to or from the polling station."(12)

(the underlining is by the author)

It is significant to observe that this is the only corrupt practice which, in explicit terms, specifies "knowledge" as an essential ingredient; the subsection requires that the act of letting, borrowing, lending or hiring must be wilful, that is to say, the offender must have prior knowledge of the fact that the vehicle or vessel will be used for conveying the voters either to or from the polling station. It is submitted that two conditions must be satisfied before an act may be said to fall within the mischief of the subsection: (a) the act should consist in

12) National and Provincial Assemblies (Elections) Act, S.80. The relevant provision in the Electoral College Act is S.61(4).

the letting, lending, borrowing or hiring of a vessel or vehicle (b) at the time of letting, borrowing, lending or hiring a person should have known that the vehicle or vessel would be used for the conveyance of voters. So, although the subsection contemplates that any person, whether a borrower or a lender, whether a hirer or a person letting on hire, and whether with or without the knowledge or consent of a candidate, can be guilty of this corrupt practice, It is possible to conceive of a case where one may be guilty while the other not guilty. For example, a borrower, who at the time of borrowing the vehicle knows that it will be used for the corrupt purpose will be guilty but the lender, if he is unaware of the purpose for which the vehicle is borrowed, may be innocent in the eye of law. It may be asked, whether the actual conveyance of the voters is also a necessary ingredient? It is submitted that it is difficult to spell out such an intention from the language of the provision. What appears to be important is the "knowledge of the purpose" rather than the purpose. But there are no decided cases on the point in Pakistan. India makes the hiring or procuring, whether on payment or otherwise, of any vehicle or vessel by a candidate or his agent or by any other person with the consent of the candidate or his election agent for the purpose of conveying an elector (other than the candidate himself, the members of his family or his agent) to or from any polling station, a corrupt practice within

the meaning of S.123(5) of the Representation of the People Act(13).It may be mentioned that the provision is differently worded from its correponding provision in Pakistan and the absence of the word "knowingly" is striking.Perhaps it may be possible to argue in an Indian Court that the actual conveyance of voters must be proved as well as the other ingredients.Indeed the Allahbad High Court has observed,in the case of Madan Lal v.Syed Zargham(14) that the corrupt practice consists in the act of procuring the conveyance and not that of the voters.The same High Court in another case observed that,

"a plain reading of the subsection(S.123(5) shows that the basic ingredient of the corrupt practice referred to consists in the procurement of any vehicle or vessel by a candidate or his agent or by any other person for the conveyance of any elector other than the candidate himself, the members of his family or his agent, to or from the polling station.The actual use of the vehicles for conveying electors is not an ingredient of the corrupt practice"  
(15)

13)The subsection,however,further permits the hiring of vehicles by an elector or several electors(as in Pakistan),and an elector at his own cost of a public transport(which calls for no comment except that it is redundant).

14) (1958)13E.L.R.456.

15)Jagan Prasad v.Krishna Datt,(1959)20E.L.R.443 at p.449.

The court also observed that the evidence of such user would be unnecessary except in so far as it may have some bearing on the question of the purpose of the pronouncement. But one would be failing in one's duty if the tendency of the Indian Supreme Court towards the other view was not pointed out. While considering what particulars should be given in an election petition, which raises an allegation of a corrupt practice under S.123(5), Shah, J., observed that, "in considering whether a corrupt practice described in S.123(5) is committed, conveying of electors cannot be dissociated from the hiring of a vehicle"(16).

In England, engagement of payment of conveying electors to the poll is not a corrupt but an illegal practice. Under S.89(3) of the Representation of the People Act, if any payment or contract for payment is "knowingly" made either before, during or after an election, for the purpose of promoting or procuring the election of a candidate on account of the conveyance of electors or their proxies to and from the polling station, the person making payment or contract and a person receiving the contract or being a party to the contract, only if he knew it was in contravention of the Act, are guilty of illegal practice. But for polling stations which

16) Balwan Singh v. Lakshmi Narain, (1960) 22 E.L.R. 273 at p.280.



are inaccessible except by sea, means may be provided for conveying the electors or proxies by sea to their polling place(17).

But perhaps the most significant feature of the Pakistan electoral laws, in the context of corrupt practices, is that even the slightest interference with a voter's right of franchise has been deemed a corrupt practice. The reference is to S.61(5) of the Electoral College Act and S.80(6) of the National and Provincial Assemblies (Elections) Act which provide that, "to cause or attempt to cause any person present and waiting at the polling to depart without voting "shall be a corrupt practice. The provision is, prima facie, expressed in very wide terms: the corrupt practice may be committed by any person, whether at the instance of the candidate or with his knowledge or connivance; the use of force or pressure is immaterial; the only ingredient is the act of causing or attempting to cause the voter to leave so that he may not cast his vote.

A critical examination of the section, however, reveals that, if the intention of the Legislature was to give it a wide import, it has probably not succeeded; the words "polling station" qualify the generality of the provision. So, a person who causes a voter to go away before he has set foot in the polling station, cannot be held guilty, although he may be acting in violation of another provision of the law, which forbids canvassing within a radius of

17) Representation of the People Act, 1949, S.90(4) and (5).

400 yards(18) or may be guilty of disorderly conduct near the polling station(19);these offences are quite distinct from a corrupt or illegal practice.It may also be pointed out that, as only authorised persons are entitled to stay in the polling station,the application of the section,must be deemed as confined to such persons as the candidates,their polling and election agents and one other person,specially authorised on behalf of each candidate.Be that as it may,the provision, which has no parallel in the English and the Indian Acts,is to be commended as a definite step towards securing free elections in Pakistan.

#### Excessive Election Expenses

The last corrupt practice,dealing with election expenses and matters ancilliary thereto,is peculiar to the National and Provincial Assemblies(Elections)Act;the absence of a corresponding provision in the Electoral College Act is to be regretted.

S.80(1) of the National and Provincial Assemblies(Elections) Act states that whoever "contravenes the provisions of S.49"will be guilty of a corrupt practice.S.48 provides ~~the~~ interpretation of what are election expenses and may,therefore,be read as part of

18)Electoral College Act,S.66;National and Provincial Assemblies (Elections)Act,S.85.

19)Electoral College Act,S.67;National and Provincial Assemblies (Elections)Act,S.86.

S.49.It defines election expenses as "any expenditure incurred or payment made,whether by way of gift,loan,advance,deposit or otherwise,for arrangement,conduct or benefit of or in connection with or incidental to the election of a candidate,including the expenditure on account of issuing of circulars or publications or otherwise presenting to the electors the candidate or his views,aims or objects,but does not include the deposit under S.13"(20).Under subsection(3) of S.49,the election expenses which a candidate may incur are limited to Rs.10,000 in the case of a seat in the Provincial Assemblyn and Rs.15,000 to a seat in the National Assembly;besides a candidate may incur personal expenditure to the <sup>amount</sup>~~time~~ of Rs.200 (21);and any person may,if so authorised by the election agent,specifying a maximum, make payments towards stationery,postage,telegram and other petty expenses(22).Unless the candidate is also his own election

20)Under S.13,a candidate must deposit Rs.500 for a seat in the Provincial and Rs.1,000 for a seat in the National Assembly.

21)S.49(2)(i).It is significant to point out that money spent in excess of this limit is not accountable towards election expenses(it was otherwise under the National and Provincial Assemblies(First Elections)Order,1962).So,a candidate,who incurs personal expenditure over and above Rs.200,although not exceeding the overall limit of Rs.10,200 and Rs.15,200, will be guilty of corrupt practice.It is submitted that the provision is harsh and should be amended;if the overall aggregate of election and personal expenses is not exceeded a candidate should not be invested with penalty.

22)National and Provincial Assemblies(Elections)Act,S.49(2)(ii).

agent, payments should be made to, and expenses incurred by, the election agent(23). In order to ensure strict control of expenditure in connection with the election of a candidate, it is incumbent upon him, if he incurs personal expenditure, and on every person making any payment, to send a statement to the election agent within fourteen days of the declaration of the result; a corresponding duty is cast on the election agent to vouch for, by a bill, stating the particulars and by a receipt, every payment made in respect of election expenses, if the amount exceeds Rs.25 (24). Thus, the section demands absolute compliance, when read with S.80(1). The section does not merely make the expenditure incurred in excess of the maximum a corrupt practice. Even the slightest contravention of its provisions, on the part of a person, on whom the duty is imposed, may render him liable to a charge of corrupt practice.

It is significant to point out that S.49 read with S.48 of the National and Provincial Assemblies(Elections)Act is a consolidation of the provisions contained in SS.61 to 64 of the English Representation of the People Act. Although the difference is largely one of arrangement of provisions, the

23)Ibid.,S.49(1) and(2).

24)Ibid.,S.49(4) and (5).

position under both Acts cannot be said to be strictly identical. But in essence it is the same. Subsection(1) of S.61 of the English Representation of the People Act provides that an account of election expenses in the shape of payment, advance or deposit made by a candidate, his election agent or another person should be made to the election agent; subsection(4) forbids a person, other than the candidate, to pay money, whether as gift, loan, advance or deposit, except to the candidate or his election agent; under subsection(6) a person who makes any payment, advance or deposit in contravention of either of the subsections is guilty of an "illegal practice". S.62 deals with and limits the personal expenditure of a candidate(25); under ~~xx~~ S.63 a prohibition is imposed on "outsiders" or "strangers", that is, persons other than the candidate or his agent, to incur expenses with a view to promoting or procuring the election of a candidate at an election, such as holding of public meeting or organising any public display, issuing<sup>of</sup>/advertising, circulars or publications, except publication of any matter relating to the election, in a newspaper or other periodical or of otherwise presenting to the electors the candidate or his views or the extent or nature of his backing, or disparaging another candidate; the latter will have no application

25) Similar to S.49(2) of the Pakistan National and Provincial Assemblies(Elections)Act.

to any expenses not exceeding, in the aggregate, ten shillings, which may be incurred by an individual and are not incurred in pursuance of a plan suggested by any person in travelling or living away from home or similar expenses(26). Subsection(2) makes a similar provision as S.49(4) of the Pakistan Act, and makes it obligatory on a person, who has incurred expenses as above, to file a return of the amount of those expenses, giving full particulars and verifying the same. But whereas in Pakistan every contravention of S.49 is a corrupt practice, by virtue of S.80(5) of the ~~the~~ National and Provincial Assemblies(Elections) Act, in the English law relating to election expenses a person is only guilty of a corrupt practice if he "incurs, or aids, abets, counsels or procures any other person to incur any expense in contravention of this section or knowingly makes the false declaration required by subsection(2) thereof falsely"(27); but failure to send any declaration or return or copy thereof is an illegal practice(28). The expenses incurred in excess of the maximum amount may render the candidate or his election agent guilty of an illegal practice, unless he can show that it was done innocently and without knowledge of the fact that it

26) English Representation of the People Act, 1949, S.63(1)(c) proviso (ii).

27) Ibid., S.63(5).

28) Ibid., S.63(5).

amounted to contravention of the provision of law(29).

The position in India deserves special mention. The Representation of the People Act, 1951, as originally enacted, made the incurring or authorising by a candidate or his agent of expenses in respect of the conduct and management of an election, in excess of the maximum amount prescribed under S.77, a major corrupt practice, entailing a disqualification of a period of six years(30); while the making of a false return of election expenses or verifying it amounted to a minor corrupt practice but with the same punishment(31). Further, the incurring or authorisation by a person other than the candidate or his agent, of expenses " for the purpose of promoting or procuring the election of the candidate, without written authority of the candidate, was made an illegal practice; the disqualification could be upto four years(32). The law in India was thus similar to that in England-and was perhaps more stringent-with one significant distinction that, whereas the contravention of the

29) Ibid. S.64(1).

30) Indian Representation of the People Act, 1951, S.123(7) read with S.140.

31) Ibid. S.124(4).

32) Indian Representation of the People Act, as originally enacted, S.125(1) and S.140(2).

provisions limiting election expenses was declared a corrupt practice per se in India, in England S.64(1) already quoted, required knowledge of the candidate or the election agent. This finds support from the decision in Munnuswami's Case(33). While disposing of the issue whether the return of election expenses furnished by the respondent was incorrect and false and he had further spent a sum larger than that allowed by the law, the tribunal observed:-

"From the foregoing sections(34), it is clear that the Legislature prescribed a maximum limit in respect of election expenses and also enjoins that a contravention of the limit calculated under whatever circumstance of good faith or misapprehension vitiates the election. We may observe here that that rule appears to be less stringent in England than in India.... Under S.64 of the English Representation of the People Act, knowledge has to be imputed to the candidate or agent, committing an illegal practice by exceeding the maximum. We have no doubt that the departure from the English law in our Act is deliberate and that the Legislature has, in its own wisdom, rendered

33) Munnuswami v. Khader Sharif, (1953) 4 E.L.R. 283.

34) Namely, SS. 123, 124, 140 of the Indian Act, 1951.



the exceeding of the maximum a corrupt practice per se."(35)

It was further observed that this appeared to be in pursuance of a statutory and fundamental principle of democracy. So far so good. The stringent provision had proved a means of checking corrupt elections. But this did not please the Congress Organisation and with a view to deliberately render the said provision less effective, and through the majority it held in the Parliament, it brought about amendment in the Act(36). S.123(6) of the amended Act provided that, "the incurring or authorising of expenditure in contravention of S.77" would be a corrupt practice. S.77 laid down that the total election expenses must not exceed the limit prescribed by law(37); a candidate or his election agent was obliged to keep a separate and correct account of all expenditure incurred or authorised by a candidate or his election agent in connection with the election(38). The period of election expenses was confined to the date of the

35) Munnuswami v. Khader Sharif, (1953) 4 E.L.R. 283 at pp. 288, 289.

36) By Representation of the People (Second Amendment) Act, 1956.

37) Representation of the People Act, 1951 (as amended), S.77(3).

38) Ibid., S.77(1) and (2).

publication of the notification of the election and the declaration of the result; whereas under the original Act the candidature was deemed to commence from the date on which a candidate publicly announced his candidature(39), from which date he was required to render the account. This change was fully noted in Shiv Ram v. Partap Rao(40). Desai, J., said,

"This would suggest that election expenses incurred by a candidate prior to the date of the publication of the notification would be exempt from the fixed limit and need not be mentioned in the account of election expenses ~~by~~ to be maintained by the candidate. It may be questioned whether such was the intention of the Legislature. But the language does seem to be clear and we do not see any ambiguity in the language employed by the Legislature in subsection(1) or in subsection(3)." (41)

The following observation of the Indian Election Commission is also significant:-

"It will be seen that the restriction of the period of accounting to the interval between the dates of the notification and

39) Munuswami v. Khader Shari, (1953) 4 E.L.R. 283. It was held that as soon as a person makes his choice and declares unambiguously his intention to stand for election and expresses it through an overt act, he becomes a candidate.

40) (1958) 17 E.L.R. 37.

41) Ibid. at p. 61.

the date of the declaration of the result completely exempts all expenses incurred or authorised by a prospective candidate prior to the notification."(42)

It was pointed out that an unscrupulous candidate was thereby legally entitled to exceed the legal maximum of election expenditure by adopting several subterfuges. He may, inter alia, buy and pay for all the petrol needed for him for his election campaign before the date of the notification; engage and pay for all his workers and agents before the date of nomination, stipulating that they must render their services to him later during the election campaign; he may pay large sums of money to his party and friends before the material date on the understanding that they will spend the amount on his behalf and during the election, without any further resort to him in respect of each individual item of expenditure, and pay the bulk of the whole of his printing and publication charges before that date. The Commission opined that, "however large the expenses actually incurred by a candidate in respect of his election may therefore be, there is ample scope for him under the present laws to manage to keep the portion thereof accountable in law down to a figure well below the maximum".(43).

42) Indian Election Commission Report (concerning the Second General Elections), 1957 p.187.

43) Ibid, at p.187.

But the matter does not rest there. At ~~the~~ present, a contravention of subsection(3) of S.77, which states that, "the total of the said expenditure shall not exceed such amount as may be prescribed"(44) is alone a corrupt practice; it is not possible to contend that a contravention of the other provisions of the section, namely subsection(1) and (2), which lay down the method and manner in which an account of the election expenses is to be kept, is a corrupt practice. In other words, an improper maintenance of accounts or non-maintenance of true accounts or failing to present accounts of election expenses will not be a corrupt practice in India. However painful this interpretation of SS.77 and 123(6) may appear to be, the courts have accepted it as, according to them, the language of these provisions is clear and free from any ambiguity. So Desai, J., of the Bombay High Court, observed:-

"the language of clause(6) of S.123 is express and explicit and apart from the consideration that any clause which lays

- 44) Under r.90 of the Indian Conduct of Election Rules, 1961, the maximum total expenditure in connection with an election in any one Parliamentary constituency is Rs.25,000 in the case of a constituency in any state and Rs.10,000 in the case of a constituency in any union territory; the maximum expenses in the case of an election in any one assembly constituency must not exceed an amount ranging from Rs.6,000 to Rs.9,000 in the case of fourteen states mentioned in the section.

down that any corrupt practice must be strictly construed, clause (6) of S.123 does not say that the contravention of that section is a corrupt practice. What it says is that incurring or authorising of expenditure in contravention of that section is a corrupt practice." (45)

In this case it had been argued that the provisions of S.77 are mandatory and as the respondent failed to ~~mention~~<sup>maintain</sup> a correct account of election expenses and suppressed material facts relating thereto, the election tribunal should have held him guilty of corrupt practice under S.123(6). Before the Panjab High Court a case with these facts came up for consideration. The respondent had committed small irregularities in the form in which accounts were maintained and a few items were not supported by vouchers. The tribunal found that it was so, but declined to hold that it constituted corrupt practice. In appeal (46), it was argued that S.123(6) included "contravention of S.77" and in as much as subsections (1) and (2) thereof imposed on the candidate the duty of keeping a separate account of all expenditure in connection with the election, incurred or authorised by him or on his behalf, a failure to maintain the account, as prescribed

45) Shiv Ram v. Partap, (1958) 17 E.L.R. 37 at p. 53.

46) in Verma, N.L. v. Muni Lal, (1958) 15 E.L.R. 495.

by subsections (1) and (2), should be regarded as corrupt practice. It was contended that, if the intention of the Legislature was to exclude subsections (1) and (2) from the ambit of S.123(6), reference should only have been made to subsection (3) of S.77. The court observed that there was no ambiguity in the language of the section. Why the Legislature had not mentioned S.77(3) simpliciter in subsection (6) of S.123, "may have been preferable as a matter of drafting". Kapoor, J., on behalf of the Court, concluded that:-

"It is not the appellant's case here that the expenses incurred.....exceeded the prescribed amount. Now the corrupt practice mentioned in subsection (6) of S.123 consists in the incurring or authorisation of expenditure, which must therefore have reference to subsection (3) of S.77 and not to any contravention of the provision of subsection (1) or subsection (2) of S.77"  
(47)

The view has been upheld by the Allahabad High Court (48). Bhargava, J., in one of these cases, said,

"The two subsections (the reference was to subsections (1) and (2) of S.77) thus merely require that correct and separate accounts be kept and give the content of these

47) Ibid., at p.499.

48) Karan Singh v. Jamna Singh, (1958) 15 E.L.R. 370; Ali v. Keshav, (1958) 16 E.L.R. 154; Ram Abilakh v. Election Tribunal, (1958) 14 E.L.R. 375.

accounts. They do not provide any limitation on the incurring or authorising of expenditure. All that is laid down by subsection(1) is that expenses which have been incurred or have been authorised <sup>are</sup> ~~to be~~ included in the account. Inclusion in the account is not a condition of incurring or authorising an expenditure. The incurring of an expenditure is limited to the provision of subsection(3) of S.77, which lays down that the said expenditure shall not exceed such amount as may be prescribed".(49)

The Rajasthan and Assam High Courts are of the same view(50).

Thus the law of election expenses in India is far from satisfactory and ought to be amended in view of the learned observations of the various authorities quoted above.

It is significant <sup>to</sup> ~~to~~ point out that <sup>the</sup> Pakistan Legislature, which since the partition of the subcontinent has shown a constant tendency towards transplanting Indian provisions into its own laws, was vigilant enough not to follow the Indian law

49) Karan Singh v. Jamna Singh, (1958) 15 E.L.R. 370 at pp. 382, 383; in this case there was omission to enter certain accounts or were not regularly kept from day to day.

50) Shepat Singh v. Harish Chandra, (1958) 16 E.L.R. 103; Biresw Misra v. Ram Nath, (1958) 17 E.L.R. 243.

on the point. While enacting its Representation of the People Act, 1957, SS. 86 to 90 were made identical with the corresponding provisions in the English Representation of the People Act, 1949. The National and Provincial Assemblies (First Elections) Order, 1962, under which the first elections to the Assemblies under the present Constitution were held, adopted these provisions without any material change<sup>(51)</sup>. The position under the present law may now be more specifically discussed.

It has been seen that a contravention of S. 49 amounts to the corrupt practice. With regard to the application of S. 49 a two-fold question of fundamental importance arises: (a) What are election expenses? and (b) From what point of time does the law require them to be accounted for? The answer for the one depends on the other.

As to what are "election expenses", recourse may advantageously be had to S. 48 of the National and Provincial Assemblies (Elections) Act, which reads:-

"Election expenses mean any expenditure incurred or payment made, whether by way of gift, loan, advance, deposit or otherwise for the arrangement, conduct or benefit of, or in connection with, or incidental to, the election of a candidate, including the expenditure on account of issuing circulars or publications or otherwise present-

51) The relevant provisions were contained in arts. 50 to 54 of the Order.



ing to the electors the candidate or his views, aims and objects, but does not include the deposit under S.13."

The section is couched in general terms and is wide enough to include practically all expenses in connection with a candidate's election. It is further amplified by the words, "for the arrangement, conduct or benefit of, or in connection with or incidental to the election of the candidate"; these may be reasonably interpreted as covering all conceivable expenditure, incurred by any person, in whatever manner and whether before, during or after an election. The question whether a particular expenditure is an "election expense" is always one of fact. In S.64(1) of the English Representation of the People Act, 1949, the words used in this context are, "on account of or in respect of the conduct or management of the election" (52). So any interpretation placed on this expression by English courts is relevant before a court in Pakistan. It may be mentioned that, the expression has been considered as a key to the interpretation of the provision. According to Denman, J.,

"the court must in every case consider (not by reference only to the definition of candidate) whether the payment in question is payment, which is made in respect

52) This provision re-enacts S.8 of the Corrupt and Illegal Practices Act, 1883, except for the ~~deletion~~ alteration in the maximum permitted amounts; so cases decided under the old Act are still relevant.

of such election. Upon these words our decision must turn"(53).

In this case it had, inter alia, been contended that respondent by himself, his election agents and other persons, on his behalf, made payments in respect of election expenses (£274 incurred at two meetings, at one of which the respondent had consented to become a candidate and at another meeting at which a resolution accepting the candidate was passed), not accounted for, incurred on account of and in respect of the conduct and management of the election. In the Maidstone Case (54), it was held that, if expenses are primarily or principally incurred for the promotion of the interests of the candidate, they are election expenses. Again in the East Dorset Case (55) it was observed that, they (election expenses) are those which have ~~no~~ connection with the association or the promotion of the political side to which the candidate belonged, but were expenses, which belonged to him personally in the course of his election. Similarly, in the Great Yarmouth Case (56) it was said that, "any expenses which you can identify

53) The Norwich Case, (1886) 4 O'M. & H. 84<sup>at p. 86</sup>; it was also held that such a question is always one of fact.

54) (1906) 5 O'M. & H. 200.

55) (1910) 6 O'M. & H. 22.

56) (1906) 5 O'M. & H. 176 at p. 181.

as being expenses for the promotion of the political views of the candidate's party do not come within the category of expenses in respect of the conduct and management of the election". It may be pointed out that these words have also been interpreted as relative to a candidate's election campaign, for it was held in the Elgin Case(57) that the conduct or management of such elections means a definite election within the knowledge and contemplation of the parties who are engaged in conducting and managing it. It follows, therefore, that the term "election expense" as defined in S.48 of the National and Provincial Assemblies(Elections)Act, includes expenditure incurred with a view to promoting the election of a candidate as distinct from that in respect of propogating general political propoganda but as observed in the Norwich Case(58), whether or not any particular expense is an election expense will always be a question of fact.

This brings us to the second question, namely when should a candidate start keeping an account of the election expenses? The answer would seem to depend on the definition of "candidate", as used in the context of SS.48-50 of the National and Provincial Assemblies(Elections)Act, 1964, S.2(4) of which defines it

57) (1895)5 O'M. & H.1.

58) (1886)4 O'M. & H.84.

as "a person proposed as candidate for election to a seat". Now a person may be nominated or rather proposed as a candidate after a notification is issued under S.11(3), calling upon the electors in a particular constituency or constituencies to nominate, that is, to propose and second the name of a duly qualified person to fill the seat for the constituency(59). This notification follows at least seven days after the notification under S.6, under which the Election Commission notifies that elections to the Assemblies will be held(60). If we confine ourselves to this narrow interpretation, the position is no different from that obtaining in India. But this could not have been the intention of the Legislature, when it deliberately opted for the English rather than the Indian provisions of law, in enacting the National and Provincial Assemblies (Elections) Act, 1964. So whereas the definition of a candidate given in S.2(4) may hold good in other respects, for our present study we must look for a different definition of the word "candidate". Indeed, it has been considered desirable to give a different meaning to "candidate" occurring in S.63 of the Corrupt and Illegal Practices Act, 1883(61), for purposes of S.8 of the said Act (62), which deals

59) read with S.12(1).

60) S.11(1)(a).

61) provisions now contained in S.103 of the Representation of the people Act, 1949.

62) provisions similar to S.64 of the 1949 Act.

with election expenses. As observed by Prof. Holland, the learned author of the Law Relating to Election Expenses",

"It may be said that the section refers to the expenses incurred before the election, so that the context must be taken to require another meaning for the word candidate..... Nevertheless the judicial decision on the point indicates quite clearly that a person may become a candidate for the purpose of S.8 before the dissolution or vacancy or the issue of the writ and that accordingly the section must apply to expenses incurred before the occurrence of any of those events." (63)

It is useful to refer to the definition of "candidate" in the English Act, to see how far it is similar to the Pakistani definition and therefore the judicial interpretation placed on it relevant. S.103 of the Representation of the People Act, 1949 reads:

"candidate, in relation to a parliamentary election, means a person who is elected to serve in Parliament at the election or a person who is nominated as a candidate at the election or is declared by himself or by others to be a candidate for election, to the office to be filled at the election, on or after the day of the issue of the writ for the election or after the dissolution or vacancy in consequence of which the writ was issued."

It may be mentioned that this definition is more comprehensive than in the Pakistan Act. Whereas under the latter a person becomes a candidate when he is nominated, the English Act goes on to provide that a person who has "declared" himself or is "declared" by others to be a candidate, also comes within the definition; again it may be "on or after the day of the issue of the writ for the election or after the dissolution or vacancy in consequence of which the writ was issued". But as the Courts have placed a different interpretation on this definition, in the context of election expenses, it will be interesting to examine some of those decisions. Thus the contention that, no election expenses may be incurred at a parliamentary election before the issue of the writ for the election or the dissolution or vacancy in consequence which the writ was issued, because there can be no "candidate" within the statutory definition, has been rejected (64). In the Rochester Case (65), since his defeat at the last election, the respondent had subscribed £250 in 1890 and £300 in 1891 to the Rochester Constitutional Association, whose Secretary later acted as respondent's election agent; the money

64) Rochester Case, (1892) 40 'M. & H. 156; Cornwall Case, (1906) 50 'M. & H. 225; East Dorset Case, (1910) 60 'M. & H. 22; Great Yarmouth Case, (1910) 50 'M. & H. 176; Lancaster Case, (1910) 50 'M. & H. 39; Northumberland Case, (1910) 50 'M. & H. 1.

65) (1892) 40 'M. & H. 156.

was alleged to have been spent in promoting the return of the respondent and in looking after registration. In May, 1892, the Association decided to give a "conversazione"; the respondent assented and refreshments were provided at a nominal price and the extra expenses were borne by the Association; none of these expenses were returned in the respondent's return of election expenses. It was held that these ought to have been included and the election was declared void. Cave, J., observed:-

"in some case canvassers are set at work and committees are formed long before the dissolution or the issue of the writ. If those expenses are not to be returned to as election expenses, the ~~many~~ words of the Act are set at nought." (66)

Again he said,

"it is impossible to say that the only expenses are to be returned which are incurred after the writ is issued. The time which elapses in many cases between the issue of the writ and the date of the election is too short to admit of the necessary preparations being made for conducting the election, and it is absolutely essential that preparation of that kind should be begun and expenses be incurred in anticipation of the writ." (67)

66) Ibid., at p. 157.

67) Ibid., at p. 159.

In the Stepney Case(68), a vote had been objected to on the ground that the voter had been retained and employed by the respondent for the purpose of the election; it was argued that the employment had taken place before the respondent had been actually selected as a candidate, and that, therefore, the money paid to the voter was not required to be included among the election expenses. Denman, J., repelled the argument in the following words:-

"It would have been a very dangerous thing for the respondent not have included this in his election expenses. It would be a very easy way of avoiding the whole effect of the Act of 1883, if these sorts of employments and payments were to pass muster, because the person who wished to be accepted as a candidate, when there were two or three in the field, and who was finally accepted as the candidate, might obtain a very great position and much popularity by spending money upon persons who were voters and who would afterwards vote....  
....By S.63 of the Act, 1883 the word, "candidate" is defined and the respondent clearly comes within the definition. We should be frittering away the Act and deciding very wrongly, if we held that this vote should stand."(69)

68)(1886)4 O'M. & H. 34.

69)Ibid. at p. 38.



In the Elgin Case(70),the respondent had described himself as a prospective candidate in Feburary 1894 but the election did not take place till July 1895;it was observed that:-

"He described his position as that of a prospective candidate and that seems good enough designation,if you will limit the meaning of candidate to its official meaning as that of a person nominated on the nomination day;but of course in construing the Election Acts it is impossible to put so limited a meaning on the word candidate and I think that from Feburary,Mr. Gordon was a candidate".(71)

In the Walsall case(72),it has been held that the candidature of a person commences ~~fræ~~ for purposes of election expenses, from the time he announced his intention to present himself as a candidate for election at the next ensuing election;that a

70)(1895)5 O'M.& H.1.

71)Ibid.at p.2.

72)(1892)4 O'M.& H.122;in this case it was proved that the respondent had been engaged as a candidate on 2.7.1892 by the Conservative Association and a little later by the Licensed Victualler's Association and that from that time these Associations had procured the candidature of the respondent by canvassing the borough and holding meetings;but the election agent was not appointed until June 24 and the election took place on July 6.Hawkin,J. observed:"it would not have been unreasonable to say that a man who contempmlates in the year 1892,becoming a candidate in the year 1896,could not; .....I think the limit of time to which we ought fairly to apply our minds is a period commencing from the time when it was first known that the respondent announced his intention to present himself as a candidate".

candidate has begun his election campaign will be a determining factor in this regard.

It is doubtful whether Courts ~~in Pakistan~~ in Pakistan would be inclined to accept the extended definition of "candidate" and draw a sharp distinction in respect of election expenses. They would argue that when the Act had defined "candidate", as one who is proposed as such for election to the seat and the word "Election", as an election to the seat held under the Act, it would be wrong to import other words into these definitions. But, as stated above, a literal interpretation would lead to absurd results, which the Legislature had tried to avoid. Apart from this, the matter presents little difficulty. The words "for the arrangement, conduct or benefit of, or in connection with or incidental to, the election of a candidate" are sufficiently comprehensive to include election expenses as relating to a period before the candidate is nominated. In other word, it may be said that the context of SS. 48 to 50 of the National and Provincial Assemblies (Elections) Act requires another meaning to the word "candidate", and indeed the interpretation clause, namely S. 2 is made subject to "anything repugnant in the subject or context".

The position may be summed up in the light of the ~~observed~~ conclusions arrived at by Prof. Holland, while interpreting the corresponding provision in the Representation of the People Act.

According to the learned author, S.64 of the Representation of the People Act may be invoked if these ingredients are present: an election campaign must have started (this comprehends the existence of a candidate, but in a wider sense than the definition of "candidate" in S.103), the expenses must have been incurred with the sole object of promoting the election of that candidate, they must be identifiable as having been incurred by the candidate (or the election agent) but not in connection with general political propaganda (73).

#### Nature of the Charge

Having examined the various corrupt practices in relation to elections, two questions remain to be considered. They are: (a) What is the nature of a charge of corrupt practice; in other words, how should election tribunals try an election petition in which an allegation of corrupt practice is made and (b) What punishment does the law prescribe, that is to say, what consequences would a person, found guilty of a corrupt practice, be required to face.

The consensus of judicial opinion (shortly to be considered) appears to be that a charge of corrupt practice is a serious charge and should, for purposes of evidence, be treated as one

73) Hilland, D.C., Law Relating to Election Expenses, the Solicitor Vol. 17 (Jan. 1950) p. 7.

relating to a criminal or quasi criminal jurisdiction. That is why the law requires absolute obedience to the provision that an election petition should contain full particulars of <sup>1</sup>all corrupt and illegal practices(74). It may be argued that the procedure prescribed for the trial of an election petition-and this is particularly true of a petition to challenge the election of a member of the Assembly-is that prescribed for trial of a civil suit and that the principles of the Code of Civil Procedure should be applied(75). This position is untenable; what we are concerned with is the nature of the issue and not the constitution or the status of the court trying it. As observed in Sri Ram v. Md. Taqi(76), whether a case is of a civil or criminal nature for this purpose does not depend on the nature of the tribunal, which tries it, or the procedure by which it is tried but on the nature of the issue. There is another way of looking at the matter. Even assuming that an election petition is to be treated like a plaint in a civil suit, once it is alleged that a criminal act has been committed, the rule applicable to criminal charges should be followed.

Electoral College Rules, r. 35;

74\National and Provincial Assemblies(Elections)Act, S.59 read with S.67(a). This matter is fully dealt with in Chapter 8, relating to Election Disputes. ~~It may, however, be mentioned that~~

75\National and Provincial Assemblies(Elections)Act, S.66; the Electoral College Act and Rules do not lay down a detailed procedure for the trial of election petitions.

76\ (1953) 8 E.L.R. 139.

That there is <sup>a</sup> similarity between a corrupt practice and a criminal offence is borne out by the decision of the Panjab High Court in Gurbanta Singh v. Piara Lal Ram(77), where the learned Judges went so far as to refer to an election petition as a "first information report", which is the document on which a criminal trial is initiated. Harbans, J., with whom ~~Harbans~~ Falshaw, J., concurred, said:-

".....it must be where a long list of witnesses are given as being the persons who will support a particular charge; no witnesses can be produced thereafter, whose names have not been recorded in the first information report. In other words, their evidence are always regarded by the courts with some suspicion, unless some reason is established for the omission of their names in the first list."(78)

Chagla, C.J., of the Bombay High Court, has observed:-

"The approach that we must make to this enquiry by the Tribunal must be the approach we would make if we were considering a case of conviction."(79)

The Supreme Court of India, in Harish Chandra v. Triloki Singh(80) and the Pakistan Supreme Court in Md. Saeed v. Election Petitions

77)(1959)20 E.L.R.350.

78) Ibid., at p.358.

79) Ahmedmiya v. Chippa Ibrahim, (1958)17 E.L.R.218 at p.223.

80)(1958)12 E.L.R.461.

Tribunal(81) and BadurulHaq v. Election Tribunal(82) have firmly held that charges of corrupt practices are of a quasi criminal nature. This being the position, two secondary questions arise: (a) on whom does the burden of proof or the onus probandi lie, that is to say, is it necessary for the election-petitioner, like the prosecution in a criminal case, to prove the allegation of corrupt practice beyond reasonable doubt? and (b) what should be the nature of evidence in such a case?

The provisions dealing with burden of proof are contained in SS. 101 to 105 of the Evidence Act(83). The principle deducible from these provisions, so far as relevant for our purposes, is that the burden of proof lies on the party who substantially asserts the affirmative. We have to consider firstly, which party would succeed if no evidence was given on either side; and secondly to examine the effect of striking out of the record the allegations to be proved, bearing in mind that the onus lies whichever party would fail, if either of these steps were taken. While applying the same standard of proof as in criminal cases to prove an allegation of undue influence the tribunal in

(81) P.L.D. 1957 S.C. 91.

(82) P.L.D. 1963 S.C. 704.

(83) Act 1 of 1872, made applicable to the trial of election petitions by the National and Provincial Assemblies (Elections) Act, S. 66(2). It is also made applicable to the trial of election petitions in India by S. 90(2) of the Representation of the People Act, 1951.

Dr. Gairola v. Gangadhar(84) held that the onus lay exclusively on the petitioner to prove the corrupt practice. It may be pointed out that this is quite different from saying that the respondent is in a position of an accused person, and is therefore absolved of his liability to disprove the case of the petitioner. It was said in Abdur Rauf v. Mulhtar(85) that, although strict proof is to be demanded of the person bringing the charge to prove his case beyond all reasonable doubt, it does not fully exonerate the person charged with corrupt practice from adducing evidence, specially of facts within his special knowledge.

It follows that the burden of proof would normally be on the petitioner; if there are special facts within the knowledge of the respondent, he must adduce evidence in rebuttal; failure on the part of the respondent to do so does not lead to an inference that the charge has been established against him.

As regards the evidence itself, it has been established that whether direct or circumstantial, it must be clear, unequivocal and conclusive; the charge must be brought home to the person alleged to have committed the act; in case of the slightest doubt its benefit must go to him. So, Sajjad Ahmed, J., in Phool Md v. Md.

84)(1953)8E.L.R.105.

85)(1952)2E.L.R.340.

Sharif(86), said:-

"the evidence in regard to offering bribe to the voters must be conclusive against the respondent and beyond any shadow of doubt; it will not be possible to come to a finding on the basis of mere assumptions, which might land us in the valley of surmises." (87)

Again, Cornelius, J., (and until recently the Chief Justice of Pakistan) in the case of Md. Saeed v. Election Petitions Tribunal (88) remarked:-

"a charge of corrupt practice is a quasi criminal charge and.....the great volume of authority in the corpus of the election law is to the effect that such an allegation must be treated for the purposes of evidence on the principles applicable to the trial of criminal charges. One such principle is that in a case of doubt raised upon the evidence the benefit of such doubt must go to the accused person. In the concluding paragraph of its report, the Tribunal professed to have given the respondents the benefit of reasonable <sup>doubt</sup> /

86) P.L.D. 1963 J. 67.

87) Ibid. at p. 80. This view has been quoted by Masud Ahmed (ex-Judge of West Pakistan High Court), Chairman of the Election Tribunal, in the recent case of Malik Ghulam v. Malik Md., P.L.D. 1968 E.T. (Journal Section) p. 26.

88) P.L.D. 1957 S.C. 91.



in the sense that what we have not accepted as an inference against the respondents, either from the evidence or from the circumstances which were at (sic) all doubtful. In the same passage they have declined to follow the rule laid before themselves by a great number of tribunals, which in the past have dealt with election disputes, as regards the nature of a charge of corrupt practice and the principle to be followed in the trial of such charges." (89)

It was further observed that the tribunal is not at liberty, when confronted with conflict of evidence upon the same question of fact, to resolve it according to their caprice or desire or on consideration of probability or perhaps a reasonable probability of the truth of the allegations of the petitioner.

#### Consequences of Corrupt Practice

The Pakistan electoral law, apart from imposing criminal penalties, render a person, who is found guilty of corrupt practice disqualified for membership of either the Electoral College or an Assembly; commission of a large number of corrupt practices avoids an election; but disenfranchisement of the electors is

(89) Ibid. at p.123.

not contemplated(90).

S.61 of the Electoral College Act and S.80 of the National and Provincial Assemblies(Elections)Act prescribe a sentence of imprisonment for upto two years or fine or both(91).Under S.72(1)(d) an election tribunal must declare the election of the returned candidate to be void;if it is satisfied that " a corrupt or illegal practice is committed by the returned candidate or his agent or by any other person,with the connivance of the ~~candidate~~<sup>candidate</sup> or his election agent" unless the candidate or the agent took all reasonable precaution to prevent its commission; subsection(3) of S.72 empowers the tribunal to declare the election void in toto,if the result of the election is materially affected "by reason of the failure of any person to comply with the provisions of the Constitution or the Act or the Rules thereunder",or "extensive corrupt practices at the election". The provisions appear,although in a simplified form,in the Electoral College Rules.Rule 36-1A lays down that,"The Tribunal

90)The Government of India Act,1935 prescribed such a disqualification.It was retained in the Representation of the People Act,1957;S.118 provided that if a corrupt practice was committed by the candidate or with his connivance or with the connivance of his election agent,the candidate or the other person would be disqualified from being registered as voter for upto six years or four years(as the case may be)from the date of the order of the tribunal;this was in addition to the disqualification to become member of the Assembly for the same period.This could no longer be incurred after the 1962 Constitution as may be seen from theNational and Provincial Assemblies(First Elections)Order,1962 and the present Act of 1964.

91)As in S.111(1)of the 1957 Act and art.73(1)of Order 4 of 1962

shall declare the election of the returned candidate or the election as a whole to be void, if it is satisfied that the result of the election has been materially affected by reason of the failure of any person to comply with, or the contravention of, any provision of the Act or these Rules".

But with regard to the disqualification, and especially in so far as the period for which it may be specified, the position under the two Acts differs. Under the Electoral College Act, a person is disqualified from being or being elected as member of the Electoral College if "he has been convicted of a corrupt or illegal practice relating to any election unless a period of two years, or such less period, as the Central Government may by notification in the official Gazette specify in the behalf, has elapsed from the date of the expiration of the sentence or, in the case of a sentence of fine only, from the date of conviction" (92) or "if he has been disqualified consequent upon a finding of such corrupt or illegal practice against him, unless the period of disqualification, or such less period as the Central Government may by notification in the official Gazette specify in this behalf has elapsed". (93). Thus the Electoral College Act specifies two types of disqualification; one as a result of conviction for commission of a corrupt practice, for which the maximum

92) Electoral College Act, S. 53(1)(i). See Chapter 4, on the Candidate, where the disqualifications are discussed at length.

93) Ibid. S. 53(1)(j).

maximum disqualification is upto two years;the other consequent upon the finding of corrupt practice given by an election tribunal,which any not exceed the period mentioned in the Government notification but for which no period appears to have been so far prescribed.In the case of elections under the National and Provincial Assemblies(Elections)Act,the period of disqualification,whether incurred as/ a result of conviction for any offence or a finding of guilty for a corrupt or illegal practice should not exceed four years.S.104 reads:-

"Whereas(sic) a person has been convicted for any offence under this Act,or has been found guilty of any corrupt or illegal practice by a tribunal,he shall, if the Commissioner makes an order to that effect,be disqualified for such period not exceeding four years as may be specified in the order,from being,or being elected as,a member of an Assembly."(94)

It may be observed that under S.104,a mere finding by the Tribunal that a person has committed a corrupt practice does not by itself operate as an/disqualification. There must be a order of

94)The provision is similar to art.77 of the National and Provincial Assemblies(First Elections)Order,1962;under S.117 of the Representation of the People Act,1957,however, the period of disqualification could be upto six years,in the case of a corrupt practice committed by the candidate himself or with his connivance.

further order from the Chief Election Commissioner endorsing it. S.105 further provides that, if a person is disqualified under S. 104, he cannot become an election agent during the period of the disqualification(95); moreover the Commissioner is empowered to remit the disqualifications incurred for failure to submit the return of election expenses(96), provided that failure or an error in statement was made due to the circumstances beyond the control of the person seeking such remission(97).

Under both Acts, however, the prosecution of a person for a corrupt practice must be commenced within six months of its commission; but if an election petition has been preferred, this can be done within three months of the passing of the order by the election tribunal(98).

95) As under art.78 of the National and Provincial Assemblies (First Elections) Order, 1962; S.119 of the Representation of the People Act, 1957.

96) Which is an illegal practice(S.81(1)). But as the provision says, "incurred for failure to submit the return ~~th~~ of election expenses as required under chapter V, or for any error or incorrect statement in such return", it comprehends S.49, the contravention of which, as already seen, is a corrupt practice.

97) National and Provincial Assemblies (Elections) Act, S.106(2); the provision is identical with that in art.79 of the National and Provincial Assemblies (Elections) Order, 1962.

98) Electoral College Act, S.79; National and Provincial Assemblies (Elections) Act, S.98.

In England, the commission of a corrupt practice, other than personation(99), is a misdemeanour and punishable with imprisonment of up to one year or with fine, which must not exceed £200 (1). A person is liable, if summarily ~~committed~~ convicted of a corrupt practice by a magistrate's court to imprisonment of a term not exceeding three months or fine not exceeding £100 or both; but if summarily convicted by an election court the imprisonment can be up to six months or a fine not exceeding £200 (2). Under S.146(6) of the Representation of the People Act, if the corrupt practice is committed by licensed victualler on his licensed premises, it may be a factor in determining whether his license should be renewed. As regards the disability to contest elections or to vote thereat, the position is as follows.

A candidate, who is reported by an election court to be personally guilty of a corrupt practice is incapable, from the date of the report, of being elected to and sitting in the House of Commons for the constituency for which the election was held or any constituency, which includes the whole or any part of the area of the first-mentioned constituency, as constituted for the purposes of the election, for ten years; if reported guilty by his

99) Personation is a felony for which a maximum imprisonment of two years may be ~~awarded~~ (S.146(3) of the 1949 Act).

1) Representation of the People Act, 1949, S.146(2).

2) Ibid., S.146(4)(a) and (b).

agent, the candidate is subject to the same incapacity for seven years(3). A candidate or other person reported by an election court personally guilty of a corrupt practice or convicted on indictment or by an election court of a corrupt practice is for five years from the date of the report or of the conviction, incapable of being registered as an elector or voting at any election in Great Britain to any public office and of being elected to and sitting in the House of Commons and of holding any public or judicial office; and if already so elected or holding such office, he would vacate the seat from that date<sup>(4)</sup>. Where any person is subject to any incapacity by virtue of the report of an election court or the election commissioners and he or some other person, in respect of whose acts the incapacity was imposed, is acquitted of any of the matters in respect of which the incapacity was imposed, the court may order that the incapacity should thereforth cease, so far as it was imposed in respect of these matters(5). Where any person, who is subject to any such incapacity, is on prosecution convicted of any such matter, no further incapacity would be imposed by reason of the conviction;

3) Representation of the People Act, 1949, S.139(2)(a) and (b).

4) Ibid., S.140(3). Under S.7(1) of the Election Commissioners Act, 1949, a similar incapacity is incurred, if the election commissioners report a person guilty of a corrupt practice.

5) Representation of the People Act, 1949, S.152(1).

subsection(4) of S.152 provides that,if a person,convicted of a corrupt or illegal practice,is subsequently reported to have been guilty thereof by an election court,no further incapacity can be imposed on him;and under S.152(5) where any person is subject to any incapacity by virtue of a conviction or of the report of the election court and any witness,who gave evidence against that person upon the proceeding for the conviction or report is convicted of perjury in respect of that evidence ,the incapacitated may apply to the High Court for setting aside the incapacity.

It may also be mentioned that the election of the returned candidate would be void,if he is reported by an election court personally guilty or guilty by his agents of any corrupt or illegal practice(6);the election is also liable to be avoided for extensive corrupt or illegal practices(7).

In India,the relevant provisions are contained in SS.139 to 145 of the Indian Representation of the People Act,1951.If a person is convicted of a corrupt practice or is found guilty as such by an election tribunal,he is disqualified (a)to become a member of Parliament or a state Legislature and (b) of voting at any election,for a period of six years.But whereas the disqualification incurred under the former may be removed or its

6)Ibid.,S.139(1).

7)Ibid.,S.142(1).



period reduced, with respect to the latter the Election Commission has only the power to remove the disqualification; however in either case reasons must be recorded in writing.

From the above we find that there can be various consequences arising from the commission of corrupt practices, extending from a sentence of fine to a punishment of a very serious nature, namely disability to vote at, and to stand for, the election for a specified period. The provisions in the English Representation of the People Act are more comprehensive and deserve study, with a view to their adoption; those in the Indian Act are very brief but tend to achieve the desired result; the Pakistan Act is notable for not providing the punishment of disenfranchisement for persons held guilty of corrupt practices. Be this as it may, it would not be wrong to say that there has been a sufficient compliance with the provisions of the Constitution, demanding an adequate safeguard against the commission of corrupt practices, in the Pakistan electoral law and this would seem to rest largely on whether the law makes such stringent provisions as act as a deterrent for the electorate. The submission will find support from the manner in which cases concerning violations of the provisions relating to election expenses under the National and Provincial Assemblies (First Elections) Order, 1962 were disposed of and the policy behind it. In all 581 persons were

prosecuted for contravention of the provisions relating to election expenses. This number did not take into account the defaulters from Tribal areas, who were generally not prosecuted, as it was felt that the tribal status of the "Maliks"(8) would thereby be questioned in the tribal areas, which would create problem for the administration and also because the elections held in the tribal territories were the first of the kind and tribesmen would not be conversant with the election law. Three hundred and sixty-five cases ended in conviction, which could have entailed a disqualification from membership of the Assembly for a period of up to four years but the Chief Election Commissioner, in his discretion, granted a general amnesty on the ground that the candidates in particular and the public in general were not aware of the action that could be taken against defaulters for contravening the legal provisions.(9). The Election Commission reports that the number of prosecutions for non-submission of returns and delayed submission of election expenses relating to the 1965 elections was considerably lower; but it was not proposed to grant a general amnesty to the persons convicted; each case must be decided on its own merits. In the said Report the Commission observed that out of 105 cases referred to the courts, there were 67 convictions and 9 acquittals, at the time of the publication of the report. The Chief Election Commissioner disqualified 42 and pardoned 25. Other cases were sub judice.

8) A "Malik" is a tribal chief, in the N.W. Province of Pakistan.

9) Report on General Elections in Pakistan (1964-65), Vol. I, pp. 184, 185.

### Illegal Practices

Having examined the various corrupt practices, it is proposed to deal very briefly with illegal practices under the Electoral College Act and the National and Provincial Assemblies (Elections) Act (10). Illegal practices assume importance because the Legislature has not, in relation to their consequences, differentiated them from corrupt practices, for wherever there is reference to one, the other is also mentioned. For example, S.104 of the National and Provincial Assemblies (Elections) Act provides that a person may be disqualified from being or being elected as a member of an Assembly if he is, inter alia, "found guilty of any corrupt or illegal practice by a Tribunal"; similarly a person, who has been "convicted of a corrupt or illegal practice (11) or has been disqualified upon finding of such corrupt or illegal practice against him (12), incurs a disqualification to become a member of the Electoral College for a specified period. Thus the same disqualification, which arises

10) It is not proposed to enumerate the illegal practices under the English Representation of the People Act (there are no illegal practices in the Indian Representation of the People Act) since the amendment in 1956) as they would not serve any useful purpose. It is not possible to define what should be and what should not be an illegal practice in an election statute. Therefore, what may be an illegal practice in the English Act may not necessarily also be illegal practice in the Pakistan Acts.

11) Electoral College Act, S.53(1)(i).

12) Ibid, S.53(1)(j).

from the commission of a corrupt practice also follows when an illegal practice is committed. With regard to the ordinary criminal penalties, a small distinction in the matter of sentence is however made. Whereas a person guilty of corrupt practice can be given imprisonment of up to two years or a sentence of fine up to Rs.1,000 or both, a maximum fine of Rs,500 only can be imposed for commission of an illegal practice(13). But perhaps a matter of greater significance is that, although illegal practices are subject to penalties similar to those incurred by corrupt practices, the former are easier to prove. What is required to be established is that there has been a violation of the law; but in a case of corrupt practice a corrupt motive or intention is insisted upon as a necessary ingredient of the offence.

The following illegal practices are common to the Electoral College Act and the National and Provincial Assemblies(Elections)

13) Electoral College Act, Ss.61,62; National and Provincial Assemblies(Elections) Act, Ss.80,81. Under S.147 of the English Representation of the People Act, a person guilty of a corrupt practice is liable, on summary conviction to a fine not exceeding £100. If reported personally guilty, a candidate is disqualified for seven years and if reported guilty by his agent, during the Parliament for which the election was held, vide S.139(2)(a) and (c). Under S.139(1), his election is void.

Act:-

- i) Obtaining or procuring or an attempt to obtain or procure the assistance of any person in the service of Pakistan, to further or hinder the election of a candidate. (14)

We have already seen that governmental patronage or official influence may amount to the corrupt practice of undue influence. The provision, under discussion, is wide enough to include even the slightest interference by a government servant, irrespective of whether there is an exercise of undue influence or not. With regard to the application of this provision, however, two points arise: (a) the provision does not make the person rendering the assistance guilty of an illegal practice (b) the operation of the provision is not extended to the President, the two Governors and the Ministers of the Central and Provincial Government (15). With regard to the former point it is to be noted that, although not falling within the definition of "illegal practice", it is a statutory offence under both Acts, punishable with imprisonment <sup>of up to two years & with fine</sup> which may extend to Rs. 1,000 or with both (16).

14) Electoral College Act, S. 62(1); National and Provincial Assemblies (Elections) Act, S. 81(2).

15) By virtue of ART. 103(2) of the Constitution of 1962.

16) Electoral College Act, S. 73; National and Provincial Assemblies (Elections) Act, S. 92.

As to the second point it may be mentioned that the exclusion is express in the National and Provincial Assemblies (Elections) Act but it would only seem to apply to the Electoral College Act, S.53(1)(b), which clearly refers to ARTICLE 103(3) of the Constitution and the omission in subsection(1) of S.62 of the words "not being a person mentioned in clause(3) of Article 103" appears to be a slip rather than a manifestation of the intention of the Legislature. However, the provision calls for comment. It is possible to conceive of a Minister canvassing for a candidate of his party, even in the discharge of his official duties and it is submitted that the provision, in so far as it permits interference by Ministers should be deleted. It may be argued that it is impractic<sup>al</sup>~~able~~ to require Ministers, when elections are imminent, either to desist from canvassing for and against candidates or desist from canvassing and performing official duties but at least they might be forbidden, when visiting areas for canvassing, to insist on being accompanied by local officials, as this might amount to exercising pressure on the electors. It is to be noted that ARTICLE 173 of the Constitution forbids any person to hold out himself or any other person or candidate for an election as having the support of any political party or organisation.

- ii) Voting or applying for a ballot paper with knowledge that the alleged voter is not qualified for or is disqualified from voting.(17)

The Constitution and the law enacted thereunder have prescribed the qualifications, necessary to be a voter at Electoral College elections and an elector at the Assemblies' elections, and have also laid down the disqualifications to which they may be subject. They have been fully discussed in Chapter 3 and 4. But there may be other cases when a person may be said to be not qualified to vote. Thus a person applying for a ballot paper and giving the name of some other person whether dead or living, is not only guilty of corrupt practice of personation but will also be committing an illegal practice within the meaning of the above-quoted provision; for when he applied for the ballot paper he was clearly not qualified to vote. So also is a voter who applies for a ballot paper more than once, in the same polling station or different polling stations, as the law forbids the voter to do so and declares that votes cast in contravention thereof would be void(18); when he applies for a ballot paper the second time, it amounts to a contravention and he is at that time a person not qualified for voting.

- 17) Electoral College Act, S.62(2); National and Provincial Assemblies (Elections) Act, S.81(3). The provision is taken from S.48 of the English Representation of the People Act, 1949.
- 18) Electoral College Act, S.40(6) and (7); National and Provincial Assemblies (Elections) Act, S.32(5) and (6).

- iii) Voting or applying for a ballot paper for voting (a) more than once in the same polling station or (b) in more than one polling station for the same election. (19)

The purpose of this provision is to prevent multiple voting, in pursuance of S.11 of the Electoral College Act, which lays down that no person should be enrolled more than once or in more than one electoral unit and, if so enrolled, "he shall not cast vote from more than one electoral unit". Since the elections to the Electoral College and the Assemblies are to be by a single non-transferable vote, S.40(6) of the Electoral College Act and S.32 (6) of the National and Provincial Assemblies (Elections) Act further provides that no elector shall vote at an election "more than once at the same polling station or at more than one polling station"; under S.40(7) of the former and S.32(6) of the latter Act "votes cast in contravention" of subsection (6) of S.40 or subsection (5) of S.32 (as the case may be) "shall be void". But this was not considered enough and the Legislature has now made it an illegal practice entailing serious consequences. Thus the maxim, "one man one vote" has been given full legislative effect.

- 19) Electoral College Act, S.62(3) and (4); National and Provincial Assemblies (Elections) Act, S.81(5) and (6).



iv) Removing a ballot paper from a polling station during the poll.(20)

This provision is to be commended, for it seeks to preserve the secrecy of the ballot, which is essential for holding free elections in the country. Indeed it is demanded by the Constitution of Pakistan(21). It may be recalled that a voter must secretly put the prescribed mark against the name of the candidate he wishes to vote for(22), fold it and insert it into the ballot box. The law further lays down that the voter or elector(as the case may be) "shall vote without undue delay and shall leave the polling station after he has put his ballot paper into the ballot box"(23). It implies that no voter shall be allowed to leave the polling station without having cast his vote; if a voter were allowed to take his ballot paper outside the polling station, ~~he~~ might show it to an agent of the candidate for whom he had voted, who might arrange for it to be deposited in the ballot box by a voter who entered the station subsequently so <sup>the</sup> secrecy

20) Electoral College Act, S.62(5); National and Provincial Assemblies(Elections) Act, S.81(7).

21) Constitution of Pakistan(1962), ART.172.

22) As in the case of an Assembly election, where a single ballot box and, consequently, one ballot paper is used for all the contesting candidates. But in an election to the Electoral College a voter does not have to mark the ballot paper nor does it bear the names of the contesting candidates or their symbols; this is so because each candidate is required his own ballot box (discussed in Chapter 5, on the Elections).

23) Electoral College Act, S.40(4); National and Provincial Assemblies(Elections) Act, S.32(4).

would be liable to be impaired or infringed. It is probably for this reason that it was considered to make its violation a corrupt or illegal practice. It should discourage voters and candidates from violating the secrecy of the ballot.

It will be observed that illegal practices, (ii) to (iv) enumerated above, relate to the conduct at the polling station; the provisions under both Acts are identical; a person who knowingly induces or procures any person to commit an illegal practice is equally guilty (24). But mention should also be made of S. 81(4) of the National and Provincial Assemblies (Elections) Act, which makes it an illegal practice, and punishable as such, if an elector votes at an Assembly election without having taken the oath required by ARTICLE 159 of the Constitution (25). It is submitted that this provision should be deleted (a) as being redundant and (b) because it is too stringent. The submission is that this <sup>is</sup> covered by S. 81(3); as a person who has not taken the oath in the prescribed manner would be a person "not qualified.....for voting" within its meaning and no further provision was required. But even so, a mere omission to take the oath does not call for the penalty which is provided for the commission of illegal practices. It is submitted that the law

24) Electoral College Act, S. 62(6); National and Provincial Assemblies (Elections) Act, S. 81(7).

25) Read with the First Schedule. The oath is to the effect that when called upon to cast his vote, an honest choice would be made by him between the several candidates, inter alia, without regard to personal gain or ~~interest~~, fear or favour, affection or ill will.

should be amended or the Election Commission should issue a directive to all Presiding Officers to allow any person, who is alleged not to have taken the oath, to do so at the time of the issue of a ballot paper to him; this would do away with the necessity of the above provision.

We have already discussed the different provisions of law relating to election expenses, when dealing with corrupt practices; those relating to the return of election expenses are contained in S.50 of the National and Provincial Assemblies (Elections) Act. S.81(1) of the said Act states that, a person who fails to comply with the provisions of S.50 is guilty of illegal practice. So it is necessary to reproduce S.50, for convenience of reference (26). It reads:-

"(1) Every election agent of a contesting candidate shall, within thirty-five days after the publication of the name of the returned candidates under section 20 or section 41, submit to the Returning Officer a return of the election expenses in the

26) The corresponding provision in the English Representation of the People Act, 1949, is S.66. Subsection (1) requires every claim against a candidate or his election agent in respect of election expenses, which is not sent in to the election agent within fourteen days after the day on which the result of the election is declared, to be deemed barred and not paid; subsection (2) requires all expenses to be paid within twenty-eight days; subsection (3) makes an election agent, paying a claim in contravention of subsection (2) guilty of an illegal practice.

prescribed form containing-

(a) a statement of all payments made by him together with all bills and receipts;

(b) a statement of account of personal expenditure, if any, incurred by the contesting candidate;

(c) a statement of all disputed claims of which the election agent is aware;

(d) a statement of all unpaid claims, if any, of which the election agent is aware; &

(e) a statement of all moneys, securities or equivalent of money received from any person for the purpose of the election expenses specifying the name of every such person.

(2) The return submitted under subsection (1) shall be accompanied by an affidavit sworn severally by the contesting candidate and his election agent and, where a contesting candidate is his own election agent, only by such candidate."

Under r.20 of the National and Provincial Assemblies (Elections) Rules, a different form of affidavit is prescribed for (a) a candidate who is his own election agent (b) a candidate who employs an election agent and (c) an election agent (27). Thus not only a failure to file the return within time or omission to file it or to support it by affidavit, but a contravention of the provisions, which require particulars of different items to

27) Form IX, X, XI attached to the Rules.

be given in the prescribed manner, amounts to <sup>an</sup> illegal practice in law. But the Election Commission has shown leniency in this regard. In cases where the election expenses, though filed in time, were not accompanied by affidavits, vouchers, bills etc. or were defective in form, it issued administrative instructions to all Returning Officers that the returns should be deemed as having been filed in time and that the defects could be remedied. But this does not affect the law and was only done as an indulgence, having regard to the facts that the candidate in particular and the public in general were unlikely to be conversant with the action required by law. That the intention of the Election Commission is to give full effect to the provisions of S.81(1) of the Act, finds support from the following information from the Report of the Election Commission.

In twenty-eight cases of delayed submissions and in seventy-seven cases of non-submission of election expenses returns (28) relating to the 1965 elections, legal proceedings were launched in courts of appropriate jurisdiction. As a result of convictions in these cases, forty-two persons were disqualified (29) for illegal practices from being or being elected as members of the Assemblies for various periods ranging from one to two years <sup>(30)</sup>.

28) sixty-seven convicted, nine acquitted, twenty-nine pending.

29) eleven were pardoned with or without warning.

30) under S.104 of the National and Provincial Assemblies (Elections) Act.

The law relating to the return of election expenses in the National and Provincial Assemblies (First Elections) Order, 1962 was similar except that the period during which the return had to be filed was limited to fifteen days; failure to comply with the provisions was an illegal practice under article 54. An interesting case is reported concerning the first elections under the 1962 Constitution as Zaffarullah v. Md. Hussain (31). In that case the Returning Officer, a deputy commissioner, being on leave, the return of election expenses was filed before the extra assistant commissioner; it was contended that the return was without effect and the respondent guilty of illegal practice. The case of Imrat Khan (32) was cited but the tribunal declined to follow it, as the view taken was obviously a technical one and ignored the basic principle of natural justice that a litigant should not be visited with a penalty for the omissions or

31) P.L.D. 1963 J. 44.

32) D.I.E.C. (1935-50) p. 1. The return had been filed before the extra assistant commissioner although the deputy commissioner was the Returning Officer. It was held that the extra assistant not having the powers of the Returning Officer, the return filed before him did not fulfill the requirements of r. 2 of part D of the Panjab Legislative Assembly Electoral Rules, 1936. Even the contention that the return had actually reached the Returning Officer the same evening and thus the provisions had been complied with, was repelled on the ground that, "it having, in fact, been lodged with Malik Nadir Khan and not with the Returning Officer, it cannot be said that, because it eventually reached the Returning Officer, it was lodged with the Returning Officer". It is submitted that the view taken was clearly a technical one and not acceptable.

or faults of the officers of the court and other functionaries. Sajjad Ahmed, J., as Chairman of the tribunal, said,

"It seems preposterous to suggest that the respondent should have chased the Returning Officer, who had gone on leave, to present the return personally to him.....We are not prepared to hold that the failure of the respondent to comply with the technicalities of the provision of article 52 (33) in the circumstances, which were altogether beyond his control, involves the commission of an illegal practice by him, as contemplated by article 54 of President's Order 4 of 1962"(34)

As the law contained in the National and Provincial Assemblies (Elections) Act, 1964 is similar, similar arguments will apply when construing its S.50. A reference to Haider Khan v. State(35), the only other reported case, may also be made. The petitioner had been convicted of illegal practice for failure to file the return of election expenses. He filed a criminal revision before the High Court contending that his conviction should be quashed on the grounds (a) that the illegal practice was committed by his election agent and (b) that he (election agent) had not been

33) corresponds to S.50 of the Act of 1964.

34) Zafarullah v. Md. Hussain, P.L.D. 1963 J. 44 at p.57.

35) P.L.D. 1965 P. 55.

prosecuted with him. It was held,

"the candidate cannot escape his liability on the plea that the failure to file the return was on the part of his agent nor can he be absolved from punishment merely because the agent had not been prosecuted along with him". (36)

S.50 of the National and Provincial Assemblies (Elections) Act requires an election agent to submit the return and a candidate may sometimes be his own election agent; it is similar to article 52 of the National and Provincial Assemblies (First Elections) Order, 1962, so the observation of the learned Judges in the Peshwar case will be relevant in a similar case under the Act of 1964.

To conclude, it may be pointed out that commission of a corrupt or illegal practice in an election is not a matter which concerns only those who indulge in them. It is a matter of vital public interest relating to the purity of elections that such practices should be brought to light, duly investigated and, as far as possible, suppressed. They do not carry the penalty of disenfranchisement for the voter, as in England and India, but there is a penalty by way of disqualification from being a member of the Electoral College or the Assembly. There are criminal penalties provided by the election statutes of 1964



and the Pakistan Penal Code. Besides a corrupt or illegal practice results in the avoidance of the election of the person in whose favour it is exercised and in the case of extensive corrupt or illegal practices, the election is rendered void(37). The finding of a corrupt or illegal practice is required to be reached by an election tribunal in Pakistan; courts and other functionaries have no jurisdiction in the matter(38).

37) Amir Abdullah v. Md. Yaqub, P.L.D. 1967 L. 722 at p. 728. It was held, "The mere commission of corrupt or illegal practice would not visit him<sup>with</sup> the consequence of his election having been declared void. It has to be proved..... that not only a corrupt practice was current but that it was of such a large scale that it could reasonably be said to have contaminated the entire election". This observation has been approved by the Supreme Court in the case cited as Abdus Sattar v. S.M. Zaidi (P.L.D. 1968 S.C. 331).

38) This was emphatically stated by the Supreme Court in Jamal Shah v. Member, Election Commission, (P.L.D. 1966 S.C. 1 at p. 42). It is based on ART. 171(1) of the Constitution, which requires disputes arising out of the count to be determined by the Election Commission (or its delegate) and other disputes to be gone into by the election tribunal. In the said case, the learned Member declined to go into an allegation of corrupt practice, on the ground that it was not within his competence and should be left to be determined by the election tribunal. The West Pakistan High Court did not agree with this but the Supreme Court approved the course taken by the Member. As all disputes under the Electoral College Act are to be determined by an election tribunal, the matter presents no difficulty. This is discussed in Chapter 8 on the Election Disputes and Chapter 9 on the Jurisdiction of Courts.

Other Electoral Offences

The statutory offences relating to elections in Pakistan may be conveniently divided into (a) those which are committed by election officers and their staff, and (b) those for which a person may, if he is found guilty, be punished. The punishment includes a sentence of imprisonment and/or fine, and is consequent upon an order of conviction by a magistrate. No prosecution for these offences may be initiated, except upon a complaint made in writing by or under the authority of the Chief Election Commissioner(39); it is left ~~to~~ him to cause such enquiries to be made as he thinks fit. In the National and Provincial Assemblies(Elections)Act it is further provided that a court convicting any person for an offence, other than corrupt practice, must send a report to the Chief Election Commissioner of such <sup>conviction</sup>, together with its recommendations, if any, considering the special circumstances of the case, for the mitigation or remission of any disqualification incurred by such person under the Act(40). The offences created by the Electoral College Act and the National and Provincial Assemblies(Elections)Act may now be enumerated.

39) Electoral College Act, S.78; National and Provincial Assemblies (Elections) Act, S.97.

40) National and Provincial Assemblies(Elections) Act, S.99.

A Registration Officer, Returning Officer, Presiding Officer or a person employed by any such person (including their delegates where properly constituted), in connection with his official duties imposed by or under the Act, is guilty of an offence punishable with fine which may extend to Rs.500, for breaches of official duty in connection with the election. But if he proves that there was a reasonable cause for the act or omission he cannot be convicted(41). Under S.71 of the Electoral College Act and S.90 of the ~~Electoral College~~ National and Provincial Assemblies (Elections) Act officials are forbidden to act for or against candidates. The provision reads:-

"A Returning Officer, Presiding Officer, polling officer or any other officer or clerk performing a duty in connection with an election, or any member of police force is guilty of an offence punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees or with both, if he, in the conduct or management of an election or maintenance of order at a polling station-

(1) persuades any person to give his vote;

(2) dissuades any person from giving his vote;

(3) influences in any manner the voting of any person; or

41) Electoral College Act, S.72; National and Provincial Assemblies (Elections) Act, S.91.

(4) does any other act calculated to further or hinder the election of the candidate."

It will be observed that a person committing the above offence would also be liable for the corrupt practice of undue influence, as clauses (1) to (4) clearly fall within the mischief of "undue influence" if accompanied by a corrupt motive or intent.

An offence is committed if a Returning Officer, Presiding Officer or a polling officer (and also the candidate and his polling agent) violates the secrecy of the ballot. This may be done in either of the following ways:

i) If he fails to maintain or aid in maintaining the secrecy of voting,

ii) If he communicates to any person, except for any purpose authorised by law, any information as to (a) the name or number on the electoral roll of any voter who has voted or who has not applied for a ballot paper, (b) the official mark and (c) the candidate ~~from~~ whom any voter has voted.

A punishment of imprisonment, which may extend to six months or fine or both is prescribed for persons convicted of this offence (42).

Among the offences which may be committed by anyone, the following deserve particular mention.

42) Electoral College Act, S. 70; National and Provincial Assemblies (Elections) Act, S. 89.

The law prohibits canvassing in or near polling stations, within a radius of four hundred yards(43);on the polling day no meetings must be convened,called or organised within the said radius nor votes solicited.Notices,placards,banners or flags for the purpose of encouraging voters to vote or asking them to desist from voting in favour of a particular candidate,although exhibited outside the specified radius,require the previous permission of the Returning Officer.Persons violating these provisions can be fined up to Rs.250.It may be mentioned that, in the last elections to the Assemblies,the provisions were relaxed on a complaint by the contesting candidates that,unless they were allowed to set up their camps within the specified areas,it would be inconvenient to them and the electors(44).

Provision is also made for ensuring order near the polling station.A person must not use a gramophone,loudspeaker or other apparatus for reproducing or amplifying sound so as to be audible within the polling station(45),or persistently shout in such manner as to be audible within the polling station,or do any act whereby a voter is disturbed,when exercising his vote,or a

43)Electoral College Act,S.66;National and Provincial Assemblies(Elections)Act,S.85.

44)Information obtained from the office of the Regional Election Commissioner,Lahore(Pakistan).

45)Under S.76(3) of the Electoral College Act and S.95 of the National and Provincial Assemblies(Elections)Act.A police officer is empowered to seize such instrument or apparatus and may even use force to prevent contravention of these provisions.

Presiding or polling officer is interfered with in the performance of his duty(46);if he does so he is guilty of an offence punishable with imprisonment of up to three months or with fine up to Rs.250 or both.S.69 of the Electoral College Act and S.88 of the National and Provincial Assemblies(Elections) Act further makes a person,who interferes or attempts to interfere,with the secrecy of voting guilty of an offence;a sentence of imprisonment(up to six months) or fine(up to Rs.500) or both may be imposed.

Finally,tempering with a ballot box,a ballot paper and other documents relating to an election is a serious offence and punishable under S.68 of the Electoral College Act and S.89 of the National and Provincial Assemblies(Elections)Act;the acts stipulated in the provision must be either done with a fraudulent intent or without due authority.Under subsection(1) a person guilty of the offence may be punished with imprisonment for a maximum period of six months or fined up to Rs.500 or both; but,if the offence is committed by those performing official duty in connection with the election,the imprisonment can be two years and the fine Rs.1,000.

46)Electoral College Act,S.67;National and Provincial Assemblies (Elections)Act,S.86.An abettor is specifically included within the meaning of"a person",by virtue of subsection(4).

Thus the Pakistan electoral laws defining corrupt practices, illegal practices and statutory offences relating to elections under the Constitution, may be said to have given legislative effect to ARTICLE 153(3) and ARTICLE 172 of the Constitution, to ensure free elections and to secure the secrecy of the ballot. *in particular.*

CHAPTER 8ELECTION DISPUTESGeneral

A full Bench of the West Pakistan High Court has held that "election" means not only the taking of the poll and subsequent declaration of the result but embraces the entire process of an election(1). So election disputes would include all disputes relating to an election, from the preparation of the electoral roll to the declaration of the result. It is possible to divide them into two categories. Disputes concerning preparation of electoral rolls, delimitation of electoral units and constituencies, acceptance and rejection of nomination papers fall in the first category and should preferably be dealt with before the poll. Those dealing with the commission of corrupt and illegal practices and interference with the secrecy of voting come under the second category; their determination ordinarily include the consideration as to whether the act or omission complained of has materially affected the result of the election. How these disputes are dealt with by the Registration Officer, the Revising Authority, the Returning Officer and the authority appointed to hear appeals from their decisions has already been discussed(2);

1). Dost Md. v. Returning Officer, F.L.D. 1966 L. 560. The decision was followed in Md. Afzal v. Miraj, F.L.D. 1967 L. 689.

2). namely chapters 2, 3, 4 and 5.



this chapter is confined to disputes which are brought before the Election Tribunal under the Electoral College Act and the National and Provincial Assemblies(Elections) Act,1964 or the Election Commission under the National and Provincial Assemblies(Elections)Act.This entails a study of the law relating to election petitions and the Election Tribunals. In particular,it will be the author's endeavour to define the true status of the Election Tribunal under the Electoral College Act.It would also be necessary to refer to the special provisions in the Pakistan Constitution for the hearing of appeals relating to the count of votes at an Assembly election, and the jurisdiction vested in a Member of the Election Commission.At appropriate places a reference will be made to the English and Indian laws,with the object of comparing the situation in Pakistan with those prevailing in the other two countries.

It is well established that if the laws provides a particular manner for doing a thing,it must be done in that manner or not at all(3).So we must find out how election disputes are required to be resolved in Pakistan electoral laws.In other words,who is competent to hear election petitions and in what manner must they be disposed of.ARTICLE 171(1) of the Pakistan

3).Leghari,A.M.R. v.Government,P.L.D.1967 L.227;Akbar Ali v.Raziur Rehman,P.L.D.1966 S.C.492.

Constitution requires election disputes to be heard by specified authorities and tribunals for final determination.

The provision reads:-

"Subject to clause(2) of this Article,  
provision may be made by law-

(a)for disputes arising in connection with the counting of votes at an election or referendum required to be held under this Constitution to be finally determind by the Commissioner or the Election Commission;and

(b)for the other disputes arising in connection with such an election or referendum to be finally determined by a Tribunal established for that purpose, and no dispute arising in connection with such an election or referendum shall be decided otherwise than under such a law,and the validity of such an election or referendum shall not be called in question except in accordance with such a law."

(the underlining is by the author to facilitate interpretation of the provision).

It will be observed that the ARTICLE requires the Legislature to make laws for determination of election disputes of specified kinds.Where no law concerning disputes of the kind stipulated in the clause has been subsequently enacted,the

presentation and hearing of the election petition should, according to one view, be as in pre existing legislation on the subject, which has been preserved and perpetuated by the Constitution(4). But according to the other, in such a situation, the question should be whether the right claimed is such as is cognisable by a civil court or a political right not so ~~xxxxx~~ cognisable; in the former the Court will have jurisdiction but not in the latter(5).

Disputes have been divided into two classes: disputes relating to the "count" and "other disputes". Different authorities are entrusted with the task of dealing with each class. Disputes falling within the first class are to be determined by the Chief Election Commissioner or a Member of the Election Commission, those falling under the second class by an Election Tribunal. This demarcation was ~~for~~ for the first time introduced by the Settlement of Disputes (First Elections) Order(6), which made provisions for the first elections to be held under the 1962 Constitution and is discussed in the latter part of this chapter(7). But a short point may be made here,

4). Brohi, A.K. Fundamental Law of Pakistan (1958) p. 657.

5). Monir, M. Constitution of the Islamic Republic of Pakistan (1965) p. 1.

6). President's Order No. 13 of 1962.

7). namely the part dealing with an Appeal from the Count.

before proceeding to examine the rest of the provisions of ARTICLE 171(1) of the Constitution. The National and Provincial Assemblies (Elections) Act, 1964 has, prima facie, been enacted in accordance with ARTICLE 171(1) in so far as it makes provisions for disputes to be referred to the Election Commission and the Election Tribunal (8). However, in the Electoral College Act the Legislature has apparently forgotten to make the distinction of the kind made in clauses (a) and (b) of the ARTICLE under discussion between disputes as to the count and other disputes. The result is that all disputes in elections to the Electoral College have to be tried by Election Tribunals. According to S. 58 of the Electoral College Act, an election may only be questioned by means of an election petition, which is to be presented to and heard by an Election Tribunal (9). It may be asked: Is the Electoral College Act intra vires the Constitution of Pakistan? If not, what is the effect? The question has come up for judicial determination before the West Pakistan High Court in Ghulam Md. V. Md. Tufail (10); an election petition challenged the count of votes in regard to

8). National and Provincial Assemblies (Elections) Act, SS. 53, 57.

9). Electoral College Rules, r. 35.

10). P.L.D. 1966 L. 576.

an election to the Electoral College; the tribunal set aside the election on the grounds that there was something wrong with the counting of votes by the Presiding Officer and the counting was not fair. The order of the tribunal was impugned in the High Court inter alia on the ground that the tribunal had exceeded his jurisdiction, in that it was not competent to decide a dispute regarding the counting of votes. It was urged that, ARTICLE 171(1) of the Constitution only contemplated legislation for the disposal of disputes regarding that count by the Election Commission or the Chief Election Commissioner; it did not countenance legislation empowering such disputes to be heard by a Tribunal, an entirely separate entity. Repelling the contention their Lordships said,

"any dispute in connection with the counting of ballot papers, which, in the contention of one of the candidates is invalid, is a matter which has not been left to be determined by the Commissioner or the Election Commission, but has to be decided by the Election Tribunal, which also decides all other disputes. Therefore, the decision of all kinds of disputes is entrusted to the Election Tribunal, and the distinction drawn by Article 171(1) between the two disputes to be decided by two different bodies has not been given effect to in the Electoral College Act"(11).

And as to whether the Act was a valid piece of legislation,

their Lordships went on to observe,

"the result of this cannot be to make the Electoral College Act repugnant to the Constitution nor is it contended before us; the Electoral College Act is an Act of the Central Legislature and it is to all intents and purposes a valid Act by reason of the legislative power existing in the Assembly. Therefore, it cannot be argued that the Act has no legislative force." (12)

Their Lordships ultimately held,

"the decision of the Tribunal is under the Electoral College Act and because the law has not been enacted so as to conform to the requirement of Article 171(1), the most that can happen is that the decision of disputes relating to counting of votes may not have the protection of Article 171(1) so as to make it a decision, which shall not be called in question in accordance with such a law. If the Election Tribunal has been entrusted with the the decision of disputes as to counting of votes, the decision is still by a body set up under a law enacted by the Central Legislature, which possesses the necessary authority and power to decide the dispute, though its decision may not have the protection of Article 171 of the Constitution" (13).

12) Ibid., at p. 574.

13) Ibid., at p. 574.

The upshot of the above discussion is that the Electoral College Act has not provided for determination of disputes as to count as required by ARTICLE 171(1) of the Constitution; it is nevertheless intra vires the Constitution. So, disputes as to the count should be raised before the Election Tribunal set up under S.59 of the Act. But the decision of the Tribunal in such a matter is not clothed with finality and the bar of jurisdiction stated in ARTICLE 171(1), to be discussed in the next chapter, would be inoperative.

Continuing the interpretation of ARTICLE 171(1), the words "such an election" refer to elections to the Electoral College of Pakistan and the Assemblies in Pakistan; ~~but~~ both are held under the Constitution. "Such a law" includes the National and Provincial Assemblies (Elections) Act, 1964 and the Electoral College Act, 1964 and rules framed under these Acts. Elections to the office of the President have been excluded for the validity of such an election cannot be called in question in any manner(14).

According to the Constitution, the disputes are to be determined only in accordance with the provisions of the said enactments. The decision of the authorities is final and is in no way amenable to the jurisdiction of courts. This is an important aspect of election disputes and will be separately discussed in the chapter dealing with the Jurisdiction of

14). Constitution of Pakistan (1962), ART. 171(2).

Courts(15).

Finally,ARTICLE 171(1) of the Constitution may not be construed as authorising the enactment of a law vesting in the Election Commission the power of dealing with a dispute arising at a pre-election stage;it relates only to the situation arising after the holding of an election(16).

An election to the Electoral College and Assemblies in Pakistan may only be challenged by an election petition, which in the context of the Electoral College Act means "a petition under section 58 calling an election in question"(17) and with reference to the National and Provincial Assemblies (Elections)Act means "an election petition under section 57"(18). In India,an election to either House of Parliament or to the Houses of Legislature of the State may only be challenged by election petition under the appropriate law(19).The "appropriate law" is the Representation of the People Act,1951,which lays down that "no election shall be called in question except by an election petition presented in accordance with the provision of

15).namely,Chapter 9.

16).Fazle Mahmood v.Md.Hussain,P.L.D.1964 L.74 at p.84.

17).Electoral College Act,S.2(7).

18).National and Provincial Assemblies(Elections)Act,S.2(11).

19).Constitution of India,Art.329.



this part"(20).The position in England is that a Parliamentary election and return to Parliament may only be questioned by an election petition.S.107(1) of the Representation of the People Act,1949 reads:"No Parliamentary election and no return to Parliament shall be questioned except by a petition complaining of undue election or undue return(hereinafter referred to as a Parliamentary election petition)presented in accordance with this part of this Act(21).

Thus the law in Pakistan,and England and India is that disputes of the kind discussed in this chapter,may only be initiated by means of an election petition which becomes the basis of an inquiry before the tribunal.This brings us to the questions what is an election petition,what is the law governing its maintainability,amendments therein and withdrawal thereof,and whether,and if so ~~the what~~ extent to which,rules of procedure,that are observed in a civil plaint or petition before a court,are also applicable in regard to an election petition.

20).Indian Representation of the People Act,S.80.

21).English Representation of the People Act,Part 111.

### The Election Petition

An election petition may be described as a post-election remedy with a view to providing redress to the defeated candidate. The right to file an election petition is a statutory right, so even where the parties agree, at the conclusion of the election, not to bring an election petition, the agreement is not binding. This finds support from the decision of the West Pakistan High Court in Abdul Shakoor v. Abdul Latif (22). Three rival candidates had signed a written agreement that the election had been conducted in a fair and free manner and that none of the contesting candidates had any complaint or grievance against the polling staff. It was contended that the election petition filed by one of them and based on such an allegation was incompetent. But the Court said,

"on no discoverable principle can this acknowledgement be regarded as conclusive on the facts stated therein nor could it otherwise impair the statutory right of the contesting candidate to file the election petition".

(23)

22). P.L.D. 1966 L. 187.

23). Ibid. at p. 194. In Amir Md v. Ata Md. (1935-50) 1 D.I.E.C. 98, it was held that election petitions are not the concern merely of the parties but are matters of public importance involving the rights of the parties.

A petitioner should not file an election petition, unless he has reasonable prospects of sustaining his allegations; it is easy to file a petition but difficult to withdraw<sup>it</sup> this requires the leave of the election tribunal, and the leave may be refused, if withdrawal was induced by a corrupt bargain or consideration(24); there is also the possibility of recrimination(25) against himself and the award of costs to the other side(26).

Only a person, who was a "candidate" for the election is competent to file an election petition(27). A candidate under the National and Provincial Assemblies (Elections) Act is a person who is "proposed as a candidate"(28); under the Electoral College Act he is a person who was "nominated for election as a member of the Electoral College from an electoral unit"(29). It may be mentioned that the term "contesting candidate" is also defined

24) See part of this Chapter on Withdrawal of Election Petition.

25). National and Provincial Assemblies (Elections) Act, S. 70.

26). National and Provincial Assemblies (Elections) Act, S. 79; Electoral College Rules, r. 36(2).

27). National and Provincial Assemblies (Elections) Act, S. 57; Electoral College Act, S. 58.

28). S. 2(4).

29). S. 2(2).

and, in contradistinction to the word "candidate", means a person who has been "validly nominated and has not withdrawn his candidature" (30). It has, however, been held that a person whose nomination papers are rejected is a candidate and entitled to bring an election petition (31). A fortiori a person who subsequently withdrew his candidature would also be competent to file a petition. S. 79 of the Indian Representation of the People Act, 1951 defines a candidate as one "who has been or claims to have been duly nominated". For the purpose of election expenses, it is further provided that any such person would be deemed to be a candidate as from the time when, with the election in prospect, he began to hold himself out as a prospective candidate. S. 38(1) defines a contesting candidate as one who was included in the list of validly nominated candidates and who has not withdrawn his candidature within the period prescribed by S. 30(c) of the Act. At first, in England, it was considered that a person whose nomination was invalid in form could not present a petition (32); but the view was not accepted in a later case (33). Under the present law, the position is

30). Electoral College Act, S. 2(4); National and Provincial Assemblies (Elections) Act, S. 2(8).

31). Jaffar Khan v. Chief Election Commissioner, P.L.D. 1965 P. 245.

32). Monks v. Jackson, (1876) 1 C.P.D. 683.

33). Harford v. Linskey, (1899) 1 Q.B. 852.

quite clear:"candidate"means a person who is nominated as a candidate at the election or is declared by himself or others to be a candidate,on or after the day of the issue of the writ for the election,or after the dissolution or vacancy in consequence of which the writ was issued(34). Thus the expression "candidate",in the context,carries the same meaning in Pakistan,England and India.

It may be noted that a voter cannot bring an election petition in Pakistan(35).It has been judicially held that such a person has no locus standi to challenge an election(36). Thirty women voters challenged the election by a writ petition on the ground that they had been deprived of their right of franchise,so the election was liable to be declared void.The respondent relied on S,58 of the Electoral College Act,which section,as already stated,provides that only a candidate is

34).Representation of the People Act,1949,S.103.

35).Electoral College Act,S.58;National and Provincial Assemblies(Elections)Act,S.57.This was also the position for first elections to the Assemblies under the 1962 Constitution(vide art.9 of the Settlement of Disputes (First Elections)Order,1962) but under the Basic Democracies Order,1959,the return of a "basic democrat"could be questioned by a voter.

36).Hamida Begum v.Provincial Election Authority,P.L.D.1966 L. 560.

entitled to file an election petition. S.A. Mahmood, J., dismissing the petition, said,

"A right to vote is not a common law right but is a creation of the statute. A dispute as to the casting of votes or other matters at an election must be decided under and in accordance with the enacted law. Therefore, in the instant case, the election could only be challenged under S.58 of the Electoral College Act, that is, by an election petition by a candidate" (37).

However, in India and England the position is different.

The law concerning persons who may bring an election petition in India is contained in S.81 of the Representation of the People Act, 1951. Subsection(1) reads:-

"an election petition calling in question any election may be presented for one or more of the grounds specified in subsection(1) of S.100 and S.101, to the Election Commission by any candidate at such election or any elector....."

(the underlining is by the author).

Thus, besides a candidate, "any elector" may bring a petition; now the term "elector" is synonymous with the "voter", as would appear from the Explanation attached to S.81(1), according to which, an elector is a person who was entitled to vote at the election to

which the petition relates, whether he has voted at that election or not. In England, a parliamentary election petition may be presented by any one or more of the following persons:-

1) A person who voted at an election or who had a right to vote at an election to which the petition relates;

2) A person claiming to have had a right to be elected or returned at the election; and

3) A person alleging himself to have been a candidate at such election. (38).

There is a material difference between the law of Pakistan on one hand and India and England on the other. Although a voter is entitled to challenge an election, by an election petition, in England and in India, he cannot do so in Pakistan. One may be asked what remedy is open for a voter or a number of voters, who are aggrieved by the result of an election. The answer would seem to be that he has none. Civil Courts are concerned with legal, not political rights and it would be difficult to establish that a voter's civil right has been infringed, if a candidate has secured his election by questionable means. S. 84 of the Electoral College Act expressly bars the jurisdiction of the Courts over the legality of any action or decision of the Commissioner, a Delimitation Officer, Registration Officer and Returning Officer. A similar bar is laid down in S. 112 of the 38). Representation of the People Act, 1949, S. 108.

National and Provincial Assemblies (Elections) Act, in respect of any action taken or decision made by or under the authority of the Election Commission, Commissioner, a Returning Officer or Presiding Officer or any other officer or authority appointed under the Act. Though some offences under the Electoral College Act are only cognisable on the complaint of the Commissioner, others are cognisable offences, which a police officer is obliged to investigate; but there are none of which the voter could file a complaint in a criminal court.

Having discovered the person who can file the election petition, it is necessary to ascertain the persons who may be joined as respondents to the petition. This involves a two-fold question: Is it only the returned candidate who is the necessary party and what would be the effect if a person, who is a necessary party, has not been impleaded as a respondent? S. 58 of the National and Provincial Assemblies (Elections) Act is to the effect that all contesting candidates and a candidate against whom an allegation of corrupt or illegal practice is made are necessary parties to an election petition (39). It has been held that the law on the point is clear and unambiguous and the Legislature requires a mandatory compliance therewith (39a).

(39). There is no specific provision in the Electoral College Act and Rules; in practice all contesting candidates are joined as respondents. If it is desired to punish the person found guilty of a corrupt or illegal practice he must be joined as respondent. The principle is that an order does not affect those who are not parties before the court.

(39a). Ahmed Nawz v. Abdul Qayyum, P.L.D. 1966 J. 126.



It may be mentioned that although a candidate, who withdrew his candidature before the poll comes within the definition of "candidate" he is not a necessary party and failure to implead him as a respondent is not a fatal defect, so as to entail dismissal of an election petition(40). In Sabir Hussain v. Abdur Rehman(41), a case under the National and Provincial Assemblies(Elections)Act, 1964, one of the candidates had retired but his notice of retirement did not reach the Returning Officer within the time specified in S.17; he did not participate in the election. It was contended that as he did not "participate" in the election nor any votes were cast in his favour, he was not a necessary party to the election petition. It was held that, if allegations of a corrupt or illegal practice are levelled against him it is incumbent on the petitioner to join him as a respondent(41a). While interpreting S.82(b) of the Indian Representation of the People Act, the provisions whereof are identical with S.58(2) of the National and Provincial Assemblies(Elections)Act, the Allahbad High Court has held that its provisions required a candidate against whom corrupt practice is alleged to be joined as a respondent, notwithstanding that he may have ceased to participate in the contest by withdrawing or retiring or becoming incapable of participation in the election. According to the learned

40) Id. Sadiq v. Ahmed Khan, P.L.D.1966 J.128.

41) P.L.D.1968 J.106.

41a) Umar Jan v. Munawar Khan, P.L.D.1968 J.100, where the Election Tribunal took a similar view.

learned Judges, if it was intended to restrict the scope of the clause, this would have been made manifest by the Legislature by introducing appropriate words to convey that intention(42).

Although S.82(b) of the Indian Representation of the People Act is identical with its corresponding provision in the Pakistan Act, clause (a), however, differs from the corresponding provision in the law in Pakistan. In India, it is necessary to join all contesting candidates as respondents, if, in addition to claiming that the election of all or the returned candidate is void, the petitioner seeks a further declaration that he or some other candidate has been duly elected; in the absence of a prayer for such a declaration, only the returned candidates are necessary parties(43). The position under the English Representation of the People Act is materially different from that prevailing in both Pakistan and India; a member whose election or return is complained of is the proper respondent in an election petition(44). It has been held that an unsuccessful candidate cannot be made a respondent against his will(45). The reasons were given in the

42) ~~Tagore v. Chatur-bhuj~~ v. Election Tribunal, (1958) 15 E.L.R. 301.

43). Representation of the People Act, 1952, S.82(a).

44). Representation of the People Act, 1949, S.108(2).

45). Lovering v. Dawson, (1875) L.R. 10 C.P. 711.

following words:-

"If Poulton had come forward to claim a seat,-if he had insisted upon making himself a respondent,-it may be that we should have held that he had taken upon himself all the liabilities which attach to a respondent. But it by no means follows that the converse of the proposition is true,-that without any act or consent on his part and against his will a man can be made a respondent, so that the petitioner may gain rights against him"(46).

It has also been held that a petitioner, who has succeeded in his petition and been granted a seat may not be petitioned against(47).

Although there is no provision in the Pakistan election law for impleading a Returning Officer as a respondent, in practice, it is invariably done. It follows that he is not a necessary party to election proceedings. But, if anything is alleged against his conduct, it would be desirable to implead him as one of the respondents(48); he would then be entitled to the same notice as is required to be given to an ordinary respondent(49). An Indian

46). Lovering v. Dawson, (1875) L.R. 10 C.P. 711. at p. 717.

47). Waygood v. James, (1869) L.R. 4 C.P. 361.

48). Salah Md. v. Md. Roz, F.L.D. 1962 L 68; Hill v. Peel (1869) 1 O'M & H 75.  
The English Act has now expressly made provision in S. 108(2).

49). Young v. Figgin (1868) 19 L.T. 499.

Election Tribunal has, however, taken a different view in Returning Officer v. G.C. Kondiah (50), where it was held that, though allegations are levelled against a Returning Officer, he is not a necessary or a proper party to an election petition. In coming to this conclusion reliance was placed on two earlier decisions reported as Amjad Ali v. B.C. Barna (51) and S.B. Adityan v. Kandaswami (52). It is submitted that none of the cases cited were applicable to the case and the decision thus arrived at is an erroneous view of the position ~~under~~ on the subject. It is submitted that the position stated above, in respect of Pakistan and England, should be fully applicable in India.

A petitioner must pay particular heed to the short period of limitation within which an election petition may be filed, for a petition filed out of time will be dismissed. The provision dealing with limitation in the Electoral College Rules reads:-

"an election petition shall be presented with  
-in thirty days next after the publication  
of the result under subsection (2) of  
section 46 by the Returning Officer in the  
Official Gazette" (53).

The provision requires that a petition to challenge an election

50). (1960) 22 E.L.R. 45.

51). (1957) 13 E.L.R. 285.

52). (1958) 14 E.L.R. 394.

53). r. 35(1).

to the Electoral College must be filed within a period of 30 days, from the date of the publication of the result in the Official Gazette. The High Court of East Pakistan has held that this provision is absolute in terms and no petition filed after the prescribed period can be entertained by the Tribunal(54). It may be noted that whereas a period of limitation is prescribed in the case of contested elections, there is none in the case of an "uncontested election". The draftsman has unwittingly failed to draw a distinction between "publication of the result" (a) on completion of a contested election(55) and (b) in the event of a candidate being declared elected unopposed(56); in consequence it has, it is submitted, inadvertently omitted to ~~make~~ prescribe any period of limitation to challenge uncontested elections. It is common knowledge that Rules should always be consistent with the Act and the omission in the former cannot have the effect of overriding the provisions of the Act, which makes provision to that effect. It is submitted that, as S.29 of the Electoral College Act contemplated uncontested elections and makes provision for publication of result in respect thereof, but no period of limitation has been prescribed in the Rules for filing an election petition against such an election, the election-

54). Ahsan Ali v. Chowdhury, P.L.D. 1966 D. 41.

55). under S.46(2) of the Electoral College Act.

56). under S.29(2) of the Electoral College Act.

petitioner would be competent to move the Tribunal within a reasonable time. So, in Jaffar Khan v. Chief Election Commissioner (57) Faizullah Khan, J., said,

"If a statute gives any right and the Act or the Rules do not prescribe any period for the exercise of such right, then the person can exercise that right irrespective of any period of limitation provided the cause of action still <sup>survives</sup> subsists!"  
(58)

His Lordship further observed,

"the omission to frame rules in regard to the period of limitation, when the Act does not prescribe any period of limitation for making election petition in the case of unopposed election, would not make the election petition moved within thirty days to be bad much less that the right specifically providing for availing the remedy of election petition be considered as abrogated" (59).

57). P.L.D. 1965 P. 245. In this case it was contended that, as the Rules did not provide for a period of limitation, the election petition was incompetent; this position is quite untenable.

58). Ibid. at p. 248.

59). Ibid. at p. 249.

Under the National and Provincial Assemblies(Elections)Act a limitation of 60 days,to be reckoned from the date on which the name of the returned candidate is published in the official Gazette,is prescribed(60).This may be in respect of an uncontested election(61)or a contested election(62).It may be noted that before a petition is referred to the Tribunal,the Chief Election Commissioner who is required,inter alia,to scrutinize it in order to satisfy himself that it is within time,otherwise an order would be made dismissing it in limine(63).It may be asked whether the Election Tribunal can hear an objection with regard to limitation.The answer would seem to be that he cannot.Under S.67,"the Tribunal shall dismiss an election petition if the provisions of S.58",relating to persons who are to be made parties,and "S.59",specifying what particulars a petition should give,the relief he may ask for,and the manner for verification of the petition,"are not complied with";a similar order is to be passed,if the petitioner fails to make the further deposit towards security of costs,as required by S.66(4).Now the period of 60 days is prescribed by r.25 of the National and Provincial Assemblies(Elections)Rules;it is done in compliance with S.57 of the National and Provincial Assemblies(Elections)Act and has no reference or relevance to either S.58 or S.59.But if the

60).National and Provincial Assemblies(Elections)Rules,r.25.

61).under S.20 of the National and Provincial Assemblies(Elections) Act.

62).as provided by S.41 of the National and Prov.Assemblies(Elections) Act.

63).National and Provincial Assemblies(Elections)Act,S.60(1).

intention of the Legislature was that the question of limitation should also be dealt with by the Tribunal, it could have included the words of S.57 within the provisions of S.67. The omission is, therefore, intentional and intended to avoid a possible conflict of jurisdictions. Examining identical provisions of the Settlement of Disputes (First Elections) Order, 1962 in Abdur Rauf v. Abdul Aziz (64), the Election Tribunal, presided by Sajjad Ahmad, J., held that as the law had entrusted the question of limitation to the Chief Election Commissioner, the Tribunal cannot attract that jurisdiction to itself. His Lordship said,

"it is incongruous to argue that the power to dismiss a petition and the power to accept it on the ground of limitation resides in two separate jurisdictions" (65).

It was further observed:-

"under the law if a duty is cast on a statutory authority and it has performed that duty, it shall be presumed that it has been duly performed unless the contrary is proved. It is not open to us to fill in the vacuum of a lack of finding on the question of limitation where a finding is not clearly given on the record by a presumption that the election commission has not adverted itself to the matter and has failed to discharge its duty" (66).

64). P.L.D. 1963 E.T. (Journal Section) 20.

65). Ibid. at p. 21.

(66). Ibid. at pp. 22, 23,



As to whether the Tribunal could give a second finding, Sajjad Ahmad, J., said,

"the argument obviously involves a conflict of jurisdiction which could not have been intended by the Legislature and ~~normaly~~ which normally it seeks to avoid. If field of legal activity is occupied by one forum of a special jurisdiction, another forum cannot be permitted to supplement it in that activity." (67)

The position under the National and Provincial Assemblies (Elections) Act, therefore, is that once an election petition is declared to be within time by the Chief Election Commissioner, it is very unlikely that a question as to its maintainability on this ground would be permitted to be raised before the Tribunal (67a).

In India the question has arisen whether a petition which is handed into the post office within the period of limitation but received by the Election Commission after the expiry of that period, should be considered as within time. It has been held there that the post office is not an agent of the Election Commission or Tribunal for receiving election petitions, and a petition sent by post should be deemed to have been presented when it is actually received in the office of the Election Commission (68).

67) Ibid., at p. 23.

67a) So held in the recent case of Sabir Hussain v. Abdur Rehman, P.L.D. 1968 J. 106.

68) Bassapa v. Nagapa, (1954) 10 E.L.R. 497; Khilunai v. Arjundas, (1952) 1 E.L.R. 497.

To deal with this problem, Rules framed under both Electoral College Act and the National and Provincial Assemblies (Elections) Act have provided that an election petition sent by registered post shall be deemed to have been filed in time if it is posted within the prescribed period of limitation(69). If the last day of limitation expires on a public holiday, the petition may be filed on the next working day(70). This principle has been held to apply, notwithstanding that the Election Commission had made special arrangements for receiving election petitions on that day(71).

S.59 of the National and Provincial Assemblies (Elections) act reads as follows:-

"(1) Every election petition shall contain-

(a) A precise statement of material facts on which the petitioner relies;

(b) Full particulars of any corrupt or illegal practice or other illegal act alleged to have been committed, including a full statement of the names of the parties alleged to have committed such corrupt or illegal practice or illegal act and the date and place of the commission of such practice or act; and

(c) The relief claimed by the petitioner."

In other words, a petition to challenge an election to the

69). Electoral College Rules, r.35(3); National and Provincial Assemblies (Elections) Rules, r.25(3).

70). General Clauses Act, 1897, S.10.

71). Kapiledo v. Suraj, (1959) 17 E.L.R.475.

Assembly, must contain a full particular of any corrupt or illegal practice or other illegal act alleged to have been committed, besides giving a precise statement of facts on which the petitioner relies and specifying the relief which he claims(72). The word "material", in the context, means necessary for the purpose of formulating a complete cause of action; the cause of action must be stated with completeness so that the petitioner may obtain relief. The ordinary dictionary meaning of the word "particular", inter alia, is a single point, a detail and the verb "particularize" as meaning to mention the particular of, to enumerate in detail. So, particulars in relation to an election petition have been held to be for the purpose of filling in the picture of the petitioner's cause of action(73). It may be asked: What is the object of enacting S.59(1)? It has been observed in the Chapter on Election Offences(74) that an allegation of corrupt practice is in the nature of a criminal or quasi criminal charge, so the object of a detailed

72) S.83 of the Indian Representation of the People Act makes identical provision, so cases decided thereunder are relevant.

73). Hari Vishnu v. Election Tribunal, (1958) 14 E.L.R. 147.

74). Namely, chapter 7.

petition is to give the respondent adequate notice of the case and enable him to come prepared for the trial. The matter has been examined by the Pakistan Courts. Examining identical provisions(75) of the ~~National and Provincial Assemblies~~ <sup>Settlement of Disputes</sup> (First Elections) Order, 1962, in Iftikhar Hussain v. Md. Hussain (76), Sajjad Ahmad, J., said,

"it represents a salient feature of the law of elections as administered under the common law in England and under the statutory enactments in the sub-continent of India; which is that election petitions are in the nature of quasi criminal proceedings and the successful respondent, whose election is impeached, stands qua his alleged corrupt and illegal practice in the election, in the capacity of an accused person, who is entitled to know from the very outset the precise nature of the charges and is not turned into a rambling and roving inquisition." (77).

It may also be observed that under S.67 of the National and

75). art. 12 of the 1962 Order, relating to particularisation of grounds, corresponds to S.59 of the 1964 Act, and Art. 21(3) to S.67.

76). P.L.D. 1963 J14; the same view has been taken in Ghulam Rasool v. Ghulam Md., P.L.D. 1966 J. 112.

77). Ibid., at p. 25.

Provincial Assemblies(Elections)Act,a petition which does not comply with S.59 must be dismissed;this interpretation has been accepted in Zakaur Rehman v.Salahuddin(78).It may be asked whether this is sacrosanct.In other words,how should a petition which contains full particulars with regard to one allegation but not the other be disposed of?Should the petition be dismissed under S.67 or should the Tribunal strike out the allegation which is not supported by full particulars and proceed to hear the one which is so supported or should the Tribunal allow incomplete particulars to be completed by amendment.The view in Pakistan and India differs in this respect(79).The Indian Supreme Court (80)has formulated the following points for the guidance of election tribunals and courts in India:-

- (a)an election petition is not liable to be dismissed in limine merely because full particulars of a corrupt practice alleged in the petition are not set out,
- (b)where an objection is raised by the respondent that a petition is defective because full particulars of an alleged corrupt practice are not given,the Tribunal is bound to decide whether the objection is well-founded,
- (c)if the Tribunal upholds the objection,it should give an opportunity to the petitioner to apply for leave to

78).P.L.D.1966 J.109.The decision of the Indian Supreme Court in Bhi Kajee v.Brij Lal,(1955)10E.L.R.357 is to the same effect.

79).Although the provisions are similar in both countries.

80).In Bhalwan v.Lakshmi,(1960)22E.L.R.273.The Court was examining S.83(1)(b)and S.90(5)of the Indian Representation of People Act,which corresponds to S.59 and S.66 respectively of the National and Provincial Assemblies (Elections) Act, 1961.

amend or amplify the particulars of the corrupt practice alleged; in the event of non-compliance with this order, the Tribunal may strike out the charges which remain vague, and

(d) although insistence upon full particulars of corrupt practice is of paramount importance in the trial of an election petition, if the parties go to trial, despite the absence of full particulars, but evidence of the contesting parties is led on the plea raised by the petition, the petition will not be dismissed; the defect in such a case is one of procedure and not one of jurisdiction of the Tribunal to adjudicate upon the plea.

On the other hand, Sajjad Ahmed, J., in Iftikhar Hussain v. Md. Hussain (81) has laid down these principles for the guidance of election tribunals in Pakistan:-

(a) if the allegations made in the petition are vague and general and none of them contain any particulars, the petition should be dismissed in limine, (81a),

(b) if the ~~allegations~~ petition consists of allegations of corrupt and illegal practices, some of which are with and the others without particulars, only that part of the petition should be admissible for enquiry, which contains allegations supported by full particulars (82),

(c) particulars that are vague and indefinite, not providing any basis for a concrete enquiry, cannot be taken into account,

81) P.L.D. 1963 J. 14.

81a) Ibid., at p. 17. His Lordship said, "the allegations of the kind are still born and an attempt on the part of the petitioner to infuse life into it and to find flesh and blood for it in the shape of subsequent additions of fresh particulars and instances of alleged corrupt practices" cannot be allowed.  
inter alia,

82) The view has been upheld by the Supreme Court in S.M. Ayub v. Yousaf Ali (P.L.D. 1967 S.C. 486). This is further discussed later in the Chapter, under the heading Amendment of Election Petition.

(d) the enquiry should be directed to the special allegations, as backed by particulars, which give a sufficient notice to the opposite party regarding the nature of the accusations made therein,

(e) fresh and additional particulars by way of new instances of corrupt practice alleged in the petition cannot be allowed, &

(f) amendments, by way of amplification of particulars already supplied, may, however, be made with the leave of the Tribunal. Similarly, further and better particulars about instances already given may be furnished with the leave of the court.

Thus an allegation of corrupt or illegal practice must be supported by full particulars; fresh allegations by way of amendment to the petition cannot be permitted, but those already in the petition may be amplified in appropriate cases with permission of the tribunal; an allegation which is not supported by particulars, and severable from those fully supported by particulars, would be struck off.

#### Grounds of Election Petition

An election to an Assembly can be challenged as being void for non-compliance by a person with the provisions of the Constitution and the law, or because a large number of corrupt practices were committed thereat; the election of the returned candidate may be impugned on the ground that his nomination was invalid, that he was disqualified to be elected on the nomination day, that he was responsible for the commission of corrupt <sup>or</sup> and illegal practice and that his election was

procured or induced by any corrupt or illegal practice(83). But the grounds on which a petition may be founded under the Electoral College are not specified. There is also no provision for dismissal in limine of a petition, which does not contain full particulars. Under S.58(2), "any candidate may file an election petition challenging the election at which he was a candidate" and under S.60, "the Tribunal shall, after giving the contesting parties an opportunity of being heard, make such order as it thinks fit". The clause gives no particulars of the grounds on which a petition must be based but examples of these grounds will be found in the definition of election offences set out in Chapter LX of the Electoral College Act, though not elsewhere in the Act or the Rules.(84). There may be a number of other grounds which, if established, will call for setting aside an election. The West Pakistan High Court<sup>has held</sup> that full particulars of a corrupt or illegal practice must be set forth in a petition to challenge an election to the Electoral College(85), although it is not expressly provided in the Act. So, the

83). National and Provincial Assemblies (Elections) Act, S.72(3) and (1). Under subsection(3), to set aside the election in toto it has to be shown that the result of the election was materially affected; this is not required under subsection(1) for setting aside the election of the returned candidate.

84) Election Offences are discussed in Chapter 7.

85) P.L.D.1966 L.755.



principles in respect of petitions for challenging elections to the Assemblies also apply to them.

The reliefs which a petitioner may claim are mentioned in S.59(2) of the National and Provincial Assemblies(Elections) Act and r.35(5) of the Electoral College Act.This does not mean that the petitioner must confine his prayer merely to one of the reliefs mentioned therein.It has been held in connection with S.84,a corresponding provision of the Indian Representation of the People Act,that a petitioner is not required to confine his prayer to only one of the reliefs and may plead in the alternative(86).

Every election petition,and, in a case of a petition challenging an election to the Assembly,the schedule thereto, must be signed and verified in the manner provided for the verification of plaints in the Code of Civil Procedure(87). It was held in Zakaur Rehman v.Salahuddin(88) that although the word "shall" has been used in both the provisions,it is

86).Marut Rao v.Gulabrao,(1953)5E.L.R.303.

87).Electoral College Rules,r.35(7);National and Provincial Assemblies(Elections)Act,S.59(3);S.83(2) of the Indian Representation of the People Act provides likewise.

88).P.L.D.1966 J,109.

directory and a defect in verification may be allowed to be cured to ensure a fair and effective trial of the petition. But the Peshawar Bench of the West Pakistan High Court, on a consideration of the provisions in the Pakistan and Indian Acts, has held that they are mandatory. Faizullah, J., said,

"This brings us to the question as to whether the failure of the petitioner to sign and verify the Annexures(sic) attached to the petition as required by S.59(3) of the Act would entail dismissal. This question admits of a short answer and in the affirmative, in view of our aforesaid discussion in which we have held that the provisions of S.67 are mandatory and non-compliance with any provision of S.59 makes it obligatory on the Tribunal to dismiss the petition and that the Tribunal cannot render the mandatory provisions as nugatory"(89).

- 89). Yousaf Ali v. Election Tribunal, P.L.D.1967 P. 207 at p.220. The court pointed out that whereas S.67 of the National and Provincial Assemblies(Elections)Act provides for the dismissal of a petition, which does not comply with the provisions of S.59(similar to S.83 of the Indian R.P.Act), S.90(3) of the Indian Act(which otherwise corresponds to S.67 of the Pakistan Act) does not envisage the penalty of dismissal(although it was so provided in S.90(4) of the Indian Act before the amendment in 1956), which is provided by the Pakistan Act.

Along with the petition must be filed a receipt showing a deposit of Rs.150,where the petition relates to the Electoral College and Rs.750,when the petition relates to an Assembly, in a Government treasury or a branch of the National Bank of Pakistan,as security for the costs of the petition(90). Additional or further security may be demanded during the trial of the election petition and is to be deposited in the same manner(91).If two or more persons file a joint petition a single security will suffice(92).

#### Amendment of Election Petition

A petition may be amended for the purpose of ensuring a fair and effective trial and for determining the real question at issue between the parties(93).It has been observed that a person who challenges the election of a returned candidate must disclose his case fully at the very outset,so that the respondent may have notice of the charges levelled against him and is not to be taken by surprise at a subsequent stage in the proceedings.It follows that the addition of a new

90)Electoral College Rules,r.35(4);National and Provincial Assemblies(Elections)Act,S.57(2).

91)Electoral College Rules,r.35(4);National and Provincial Assemblies(Elections)Act,S.66(4).

92)NarutRao v.Gulab Rao,(1953)5E.L.R.303.

93)National and Provincial Assemblies(Elections)Act,S.66(3); Zakaur Rehamn v.Salahuddin,P.L.D.1966 J.109;Umar Jan v. Munawar Khan,P.L.D.1968 J.100.

particular, like fresh instances of corrupt practice, will not be permitted(94). The meaning of the expressions "necessary for ensuring a fair and effective trial" and "determining the real questions at issue" cannot be extended to embrace at any stage, fresh instances and fresh particulars of corrupt practice, that a petitioner may be able to discover after an election petition has been presented(95). Further particulars may be added, with the leave of the Tribunal, to elucidate or explain what is already in the petition. Sajjad Ahmad, J., as Chairman Election Tribunal, refused permission to amend, because what was being asked for was not an amendment of the petition. His Lordship said,

"It is definitely something which is being added to it and to allow this in our view, definitely goes against the main object of article 12 of the Order in regard to the supply of particulars, which is to limit the generality of the proceedings and to define and limit the

- 94). ~~National and Provincial Assemblies (Elections) Act~~ xxxxxxxx  
Md. Saeed v. Election Petitions Tribunal, P.L.D. 1957 S.C. 91.
- 95). Yamuna Prasad v. Jagdish Prasad, (1957) 13 E.L.R. 1 .

issues on which the parties have to go to trial".(96)

It has also been held that allow an amendment in such a case amounts to the admission of a fresh petition against the successful candidate, after the period of limitation had expired, which is not permitted by law(97).

The Code of Civil Procedure, 1908, has been specifically applied to the trial of election petitions both under the National and Provincial Assemblies (Elections) Act and the Indian Representation of the People Act, but subject to two limitations: (1) that the power of amendment under the Code of Civil Procedure cannot be exercised so as to defeat the mandatory provisions of the Act (2) that if there is a conflict between the statutory procedure prescribed in the Act and the procedure in the Code of Civil Procedure, the latter must give way to the former on the well-recognised principle that in such a case recourse should be had to the special law rather than the general law. So the general power to allow amendments under

- 96) *Iftikhar Hussain v. Md. Hussain*, P.L.D. 1963 J. 14 at p. 19. Their Lordships were examining the provisions of the Settlement of Disputes (First Elections) Order, art. 12 thereof corresponds to S. 59 of the National and Provincial Assemblies (Elections) Act and art. 21(4) of the Order (1962), which provides for amendment, is similar to S. 66(4) of 1964 Act; *Umar Jan v. Munawar Khan*, P.L.D. 1968 J. 100.
- 97) *Iftikhar Hussain v. Md. Hussain*, P.L.D. 1963 J. 14; *Md. Aslam v. Abdul Bari*, P.L.D. 1963 J. 25; *Sabir Hussain v. Abdur Rehman*, P.L.D. 1968 J. 106; *M. A. Mutiah v. Saw Ganesam*, (1957) 13 E.L.R. 201; *Yamuna Prasad v. Jagdish Prasad*, (1957) 13 E.L.R. 1.

the Civil Procedure Code are subject to the special provisions in the Act(98).In other words,the power to allow amendment should be exercised subject to two conditions namely for ensuring an effective trial and for determining the real questions at issue(98a).In Md.Hussain v.Md.Khan(98b),with regard to the application of the Civil Procedure Code,it was alleged that subsection (1) of S.66 of the National and Provincial Assemblies(Elections)Act,which makes the C.P.C. applicable to the trial of election petitions,controls S.66(3).In other words it was argued that the power of the tribunal to allow amendments is not confined to to S.66(3) but is to be exercised under the general provisions of the Civil Procedure Code.The tribunal observed that the argument should be rejected because,"subsection(1) of section 66 is made subject to the other provisions of the Act,~~which exists~~ unlike subsection (3) of S.66 of the Act,which is not so controlled".

98)Yousaf Ali v.Election Tribunal,P.L.D.1967 P. 207;~~Ch~~ Md.Hussain v.Md.Khan,P.L.D.1968 J. 95;Umar Jan v.Munawar Khan,P.L.D. 1968 J. 106;M.A.Mutiah v.Saw Ganesam,(1957)13 E.L.R.201.

98a)Umar Jan v.Munawar Khan,P.L.D.1968 J. 100.

98b)P.L.D.1968 J. 95.

If some of the allegations contained in the election petition are vague and indefinite the practice is to strike out only the defective portion(99).In S.M.Ayub v.S.Yousaf Ali(99a)the Pakistan Supreme Court observed that,the various allegations in an election petition do not constitute an "integral package" as would lose its integrity by the failure of one of its parts.It was held that the relief sought in such circumstances can be granted on a single transaction covered by clause(1) of S.72 of the National and Provincial Assemblies(Elections)Act and that the mere fact that some of the allegations made in the petition are defective should not stand in the way of adjudication of other allegations properly made and substantiated with full particulars.A Bench of three Judges of the West Pakistan High Court was constituted to examine the question in view of a conflict in judicial decisions(99b),but it did not go into the reference in view of the pronouncement of the Supreme Court.

99)S.M.Ayub v.S.Yousaf Ali,P.L.D.1967 S.C.486;Arif Iftikhar v. Election Tribunal,P.L.D.1968 L.1387;Ghulam Rasool v.Ghulam Md,P.L.D.1966 J.112;Irafan Ahmed v.Md.Sajjad,P.L.D.1966 J.121;Iftikhar Hussain v.Md.Hussain,P.L.D.1963 J.14;Md. Saeed v.Election Petitions Tribunal,P.L.D.1957 S.C.9.

99a)P.L.D.1967 S.C. 486.

1 )Arif Iftikhar v.Election Tribunal,P.L.D.1968 L.1387.

Election petitions are not the concern solely of the parties, as in an ordinary suit; they are matters of great public importance involving rights of the entire constituency. After an election petition is filed, certain forces are released which the petitioner will not be able to recall; on the other hand, he must pursue the petition to its logical end. Thus proceedings cannot be brought to an end by a mutual agreement between the parties or by their deaths(2). A petition to set aside the election of a deceased person is competent(3). In the case last mentioned, Lawson, J. said,

"this is not a proceeding of a personal nature against a dead man; it is the assertion of a right in rem, a right to set aside an undue return, and in no sense falls within the meaning of the maxim, actio personalis moritur cum persona." (4).

S.77 of the National and Provincial Assemblies (Elections) Act provides that <sup>if</sup> a respondent dies before the conclusion of trial or gives notice of his refusal to contest the petition, the Tribunal will proceed to decide it ex parte. A petition abates

2). Amir v. Ata, D.I.E.C. (1935-50) 98.

3). Tipperary Case, (1875) 3 O'M&H 19.

4). Ibid., at p.21; an objection had been taken as to the power of the court to entertain the petition which was not presented until the death of the member, whose election was impugned.



only on the death of a sole petitioner or of the sole survivor of several petitions(5).In India,a person who could have been a petitioner or respondent to the original petition may be substituted in the case of death of either the petitioner or the respondent,or where the original parties fail to prosecute it(6).The reason was thus stated by Mahajan,C.J.,of the Indian Supreme Court,

"These provisions have been made to ensure that the election process on which the democratic system of Government is based is not abused or misused by a candidate and that enquiry is not shut out by ~~xxxx~~ collusion between persons made parties to the petition or by their respective deaths."(7)

It may be mentioned that the provisions with regard to abatement of a petition in England are contained in SS.133 and 134 of the Representation of the People Act,1949 and are similar to those in the Indian Act.

5).National and Provincial Assemblies(Elections)Act,S.76(1).

6).Representation of the People Act,1951,SS.115,116.

7).Jagan Nath v.Jaswant Singh,(1954)9E.L.R.231 at pp.241,242.

### Withdrawal of Election Petition

With regard to the withdrawal of election petitions, the National and Provincial Assemblies(Elections)Act and the Indian Representation of the People Act make a somewhat similar provision. Before an Election Tribunal is appointed, the petitioner may withdraw his petition by leave of the Chief Election Commissioner or his delgate(in Pakistan) or the Election Commission(in India), and in other cases with permission of the Tribunal(8). Leave will ordinarily not be refused but where withdrawal is induced by an improper consideration or is the result of a compromise to prevent evidence from being brought forward, leave will not be granted. It is pertinent to point out that, whereas the Pakistan law is silent on this point, India makes a specific provision therefor. Under S.110(2) of the Representation of the People Act, no application for withdrawal shall be granted, if, in the opinion of the Election Commissioner or the Tribunal, it is induced by any bargain or consideration that ought not to be permitted. In the absence of such a provision in Pakistan, the rule has been established by decisions of the tribunals and courts.

8). National and Provincial Assemblies(Elections)Act, S.75;  
Representation of the People Act, SS.108,109.

In the North Durham Case, Grove, J., said,

"if the Judge saw that the withdrawal was the result of any compromise to prevent evidence from being brought forward, he ought not to allow a petition to be withdrawn, but he ought, as far as he has power to do so, to insist upon the petition being proceeded with." (9).

It was further observed,

"the task would no doubt be an extremely difficult one, and the mode in which a Judge is to compel parties to go on with a petition which they have determined to withdraw, remains to be discovered. I am not aware of how it can be made compulsory but at all events the Judge has a power over the deposit in court, which may in some degree be indirectly used as a compulsion" (10).

It is also relevant to mention the Northern Division of Meath Case<sup>(11)</sup> where it was held that a court must not consent to any

9). (1874) 3 O'M&H 1 at p.2.

10). Ibid, at p.3.

11). (1892) 4 O'M&H 185.

agreement for the withdrawal of a petition, which has the effect of excluding the full disclosure of the facts which it is one of the objects of the law to provide for or of preventing that ~~th~~<sup>h</sup>rough investigation, which the court is bound to make of all the charges relied on by the petitioner. Thus, a tribunal should be reluctant to permit withdrawal, inter alia, in the following cases:-

a) When request is made at an advanced stage in the trial, e.g., when the respondent is about to conclude his case;

b) When the petition is opposed by the respondent and it is desirable that the respondent, whose integrity the petitioner assails, be given a decision on merits;

c) Where the petition discloses that a large number of corrupt practices took place at the election; and

d) When the application for withdrawal is a result of an illegal compromise between the parties.

It is desirable that upon withdrawal of a petition, the petitioner be ordered to pay the costs of the respondent.

The English Representation of the People Act makes a detailed provision for the withdrawal of election petition(12) and prescribes a punishment of imprisonment or fine in a case 12).SS.127.128.

of corrupt withdrawal(13).Every permission to withdraw is required to be reported to the Speaker(14).In India,the Tribunal must report the withdrawal only when no other person comes forward,upon an application for withdrawal being granted, to be substituted in place of the petitioner withdrawing(15).

The Pakistan National and Provincial Assemblies(Elections) Act and the Electoral College Act lay down no detailed procedure for withdrawal;this is especially true of the Electoral College Act.It is submitted that this like many other lacunae in the Electoral College Act or the Rules,is an example of the Legislature's neglect to have sufficient regard to the necessity of preventing misconduct in elections.to the Electoral College.More consideration to this matter has been given in the provisions relating to elections to the Assemblies. The author will make suggestions for amending the law relating to the Electoral College in order to bring it in line with the provisions relating to elections to the Assemblies(16).

13).Representation of the People Act,S.129.

14).Ibid,S.131.

15)Indian Representation of the People Act,S.111.

16)See Chapter 10.

### The Election Tribunal

To give legislative effect to ARTICLE 171(1) of the Constitution, the Electoral College Act and the National and Provincial Assemblies (Elections) Act have provided for the establishment of election tribunals to decide election petitions concerning elections to the Electoral College and the Assemblies in Pakistan. The tribunals set up under the Electoral College Act are treated differently from those constituted under the National and Provincial Assemblies (Elections) Act. It is, therefore, necessary to examine the provisions relating to election tribunals in each of the two Acts. Under the former the tribunal holds a summary enquiry; under the latter it must hold a regular and elaborate trial. An attempt will be made to describe the true status of the tribunal under the Electoral College Act.

### Election Tribunal for Electoral College Elections

S.59 of the Electoral College Act states:-

- "(1) For the trial of election petitions, the Commissioner shall, by notification in the Official Gazette, appoint an officer to be an Election Tribunal for such areas as may be specified in the notification,
- (2) Where the person constituting an Election Tribunal is succeeded by another, the trial of a petition shall continue before the person so succeeding and any evidence already recorded shall remain upon the record."

The Chief Election Commissioner or the Chairman, Provincial Election authority, to whom powers have been delegated by the former, may appoint officers to act as election tribunals. It is imperative that the notification appointing a person as an election tribunal be published in the Gazette before he takes up a petition(17). Lawyers are ineligible for appointment. It is interesting to note that the law does not prescribe qualifications for the office. Officers with no judicial judicial experience may function as "competent tribunals" under the Act. The words "succeeded by another tribunal" have been the subject of judicial review in Pakistan. It has been held in Mir Md. v. Election Tribunal(18) that the provision contemplates a situation where the election tribunal has ceased to exist and is replaced by another tribunal. The same Court has also held that, if two tribunals are co-existing, the one cannot be said to have succeeded the other; the provision is meant not to safeguard the interest of the parties and ensure that evidence already recorded may remain on the record without the need for a de novo trial.

There was nor provision for the transfer of election

17) Md. Osman v. M. Ahmed, P.L.D. 1967 D. 786.

18) P.L.D. 1966 K. 119.

petitions(19) under the Electoral College Act(19a) until S.59A was inserted by the Electoral College(Amendment)Act of 1967, which empowers the Chief Election Commissioner to transfer a petition from one tribunal to another,which could proceed from the stage at which the transfer was ordered,though the tribunal receiving the petitions could recall any witnesses already examined(19b).All such actions taken before the amendments were given past validity(20).

19)The lacuna was pointed out by Mohammad Iqbal,J.,in Ghulam Qadir v.Ahmed Shafi,P.L.D.1967 L 68.His Lordship observed that an officer appointed as election tribunal may be disqualified to act in a particular election petition;there may be circumstances likely to cause a reasonable apprehension in the mind of one of the parties that he will not have a fair trial before a certain officer;the tribunal may be so influenced by his own act or by the act of another ~~so~~ as to be incapable of exercising his judicial faculties impartially.It was suggested that the Legislature,usually astute to make comprehensive provisions for the transfer of cases before tribunals exercising judicial or quasi judicial powers,should enact an express provision empowering the Chief Election Commissioner,or a person authorised by him,to order transfer of election petitions in appropriate cases.

19a)It is true that one tribunal could not transfer an election petition to another tribunal but the Chief Election Commissioner could perhaps do it by virtue of the powers vesting in him under S.82 of the Electoral College Act.Under the said section he has wide power to pass any order for the purpose of ensuring a fair and honest election.However,the power is to be exercised within the provisions of the Act and the Rules,so the section would be inapplicable where the actual facts are not within the conditions laid down for the exercise of the power.

19b)S.8 of the Amending Act,2 of 1967.

20 )Ibid.,Validation Clause.



The powers of the tribunal, and the manner in which the trial of an election petition will be conducted, are contained in S.60 of the Electoral College Act and r.36 of the Electoral College Rules. Both provisions are reproduced in extenso.

"(1) A Tribunal shall, upon receipt of an election petition, give notice thereof to all contesting candidates at the election to which the petition relates.

(2) Subject to any rules made in this behalf, the Tribunal shall, after giving the contesting candidates an opportunity of being heard and taking such evidence as may be produced before it, make such orders as it may think fit.

(3) The decision of the Tribunal on an election petition shall be final." (21)

(the underlining is by the author)

and,

"(1) On receipt of an election petition, the Tribunal shall give at least a week's notice to the respondent named in the petition and after holding a summary enquiry record its findings,

21) Electoral College Act, 1964, S.60.

Provided that an election petition may  
be withdrawn.....

Provided further that an election petition shall abate.....

(1A)The Tribunal shall declare the election of the returned candidate or the election as<sup>a</sup>whole to be void if it is satisfied that the result of the election has been materially affected by reason of the failure of any person to comply with or the contravention of any provisions os the Act or these Rules.

(2)The order of the Tribunal shall specify the costs.....

(3)If the costs are not claimed.....

(4)At any stage of the trial if there is no respondent left the proceedings shall be decided ex parte."(22)

(the undelining is by the author)

The tribunal must give notice to all contesting candidates afford an oppartunity of being heard to the parties and take such evidence as may be produced,the summary nature of the enquiry notwithstanding.These requirements are of fundamental requirement and give legislative effect to the well-known principle of natural justice,audi alteram partem.The requirement of a week's notice is imperative and would demand absolute obedience.According to Maxwell,if powers,rights or

immunities are granted with a direction that certain regulations, formalities and conditions shall be complied with, it is neither unjust or inconvenient to demand a rigorous observance of them as essential to the acquisition of the right or authority conferred; enactments regulating the procedure in court are usually imperative and not merely directory(23). It has been held that a notice, which falls short of the prescribed period, vitiates the entire proceedings(24), even though the respondents had indirect knowledge of the proceedings(25).

A number of decisions, when impugned before the High Court, revealed that election tribunals were greatly misled by the provisions of the law itself. The words "such evidence as may be produced", in view of ~~the~~ "summary enquiry" contemplated by the Rules, were interpreted to mean that the tribunals were not obliged to call for evidence; in some cases permission to produce evidence was directly or indirectly refused. The expression "such order as it may think fit" further strengthened their view that the tribunals were masters of the situation and

23) Maxwell, Interpretation of Statutes (1962), chapter 12, S.3.

24) Md. Akram v. C.A. Saeed, P.L.D. 1965 L. 703.

25) Girdhari Lal v. Thakur Kahan, (1958) 19 E.L.R. 352.

possessed autocratic powers to deal with the petitions before them. This was clearly a misconception of the law. In 1965 the case of Mohammad Akram(26) and in 1966 the case of Abdul Hamid(27) were decided; these decisions settled the law to a considerable extent.

In Md. Akram v. C.A. Saeed(28), the main ground of attack, common to five-connected petitions, was that there had been impersonation by voters on a large scale, to which the respondent in each of the petitions was a privy and this had materially affected the result of the election. The tribunal took up these petitions along with one hundred and thirty-five others and decided them within an hour. It accepted the allegations in the petitions without calling for any proof to substantiate them; the election of the returned candidate was declared void in each case and the petitioner ~~was~~ duly elected, although in some cases the prayer was for setting aside the election in toto. In the High Court, it was contended that the tribunal had made a mockery of the proceedings, which were conducted in violation of <sup>provisions of the</sup> ~~the~~ Electoral College Act and Rules, and that the impugned orders were mala fide, illegal and

26) P.L.D. 1965 L. 703.

27) P.L.D. 1966 L. 16.

28) P.L.D. 1965 L. 703.

oppressive. The other side contended that the proceedings being of a "Summary" nature, the tribunal was not bound to adjourn the case for the production of evidence, much less to summon the witnesses. A reference was made to the National and Provincial Assemblies (Elections) Act, which specifically ~~invested~~ election tribunals constituted under it with the powers of a civil court to summon witnesses. It was contended that a tribunal constituted under the Electoral College Act enjoyed no such powers; the omission was deliberate and could not be explained upon any hypothesis other than that the tribunal was not obliged to call for evidence. Mohammad Gul, J., with whom Sajjad Ahmed, J., agreed in entirety, said:-

"But to say that, proceedings being summary, the Tribunal is not bound to hear evidence would not only be opposed to the express provisions of the statute but also opposed to elementary principles of justice. Therefore respondent No. 1 (election tribunal) was sadly mistaken, if he thought that summary procedure envisaged in rule 36 made him an absolute master of the situation so that he could allow or refuse to hear evidence according to his sweet will". (29).

His Lordship went on to observe:-

"Refusal to adjourn the case in the above circumstances or to summon the witnesses would be tantamount to denial of a reasonable opportunity to produce evidence". However, evidence can be produced with or without the aid of the process of a court Ex facie, there was nothing in law to forbid the Tribunal to issue summons or at least a letter of request to a material witness in the case. It would be illogical to suggest that a Tribunal constituted under the Act to settle election disputes would be powerless to require the attendance of witnesses before it, which is a sine qua non for the exercise of all judicial or quasi judicial jurisdiction".

(30)

Their Lordships held that the hearing allowed by the Tribunal was illusory and the summary enquiry conducted by it fell short of even the minimum statutory requirement and the consequent order could not be sustained on any recognised principle of law and equity.

In Abdul Hamid v. Karam Dad (31), the petition complained of "bogus voting" and of certain voters having cast their votes

30). Ibid., at pp. 708, 709.

31). P.L.D. 1966 L. 16.

in more than one electoral units. The tribunal relied on affidavits for setting aside the election of the returned candidate; no opportunity was afforded him of producing oral evidence in rebuttal. The High Court held that, although the tribunal was not a court and the Evidence Act and the Code of Civil Procedure had not been made specifically applicable to the trial of election petitions, it was nevertheless charged with the paramount duty to act judicially. Sajjad Ahmed and Mohammed Akram, JJ., held,

"The tribunals, especially in cases where they are required to adjudicate upon the civil rights of the parties, are under an obligation to act judicially and are bound to follow the fundamental rules of evidence ~~and~~ fairplay, which are embodied in the principles of natural justice. They are required to give an opportunity to the party affected, make some kind of enquiry, give hearing and to collate evidence, if any, considering all facts and circumstances bearing on the merits of the controversy before any decision is given by them. These are essential elements of a judicial approach to the dispute. Prescribed forms of procedure are not necessary to be followed, provided in coming to the conclusion

these well-recognised norms and principles of judicial approach are observed by the Tribunal."(32)

The desirability of a proper trial has also been emphasised in Ghulam Qadir v. Ahmed Shafi(33), Abu Ahmed v. Addl. D.C.(34) and Id. Yamin v. Election Tribunal(35).

The importance of taking evidence at the trial of an election petition has been stated by the East Pakistan High Court in these words:-

"Proceedings before the Election Tribunal constituted under the Electoral College Act, is a judicial proceeding and it must conform to certain fundamental procedure applicable to a judicial proceeding. One such procedure applicable to a judicial proceeding is that the finding must be based on evidence."(36).

The manner in which evidence may be recorded by the Tribunal has been considered by a full Bench of the West Pakistan High Court(37). It was held that, although a tribunal is expected to record statements of witnesses in full, as the examination of proceeds, where it is pressed for time, because <sup>of</sup> a large number of election petitions involving a number of witnesses ,

32) Ibid, at p.27.

33) P.L.D.1967 L. 68.

34) P.L.D.1968 D. 430.

35) 1968 K. 397.

36) Abdul Aziz v. Provincial Election Authority, P.L.D.1966 D. 608. at p.61

37) Abdul Qayyum v. Election Tribunal, P.L.D.1966 P.224.



it will be a sufficient compliance with subsection (2) of S.60. of the Electoral College Act, if the substance of the evidence is recorded on the date of the hearing of the evidence and the tribunal gives reasons for dispensing with the recording of a full statement. As to whether a summary of the evidence in the order will be a sufficient compliance, the court held that it would be if the following conditions were complied with:-

1) If the tribunal on account of extreme pressure of work embodies the gist of the evidence which has been heard on the same day on which the finding is recorded;

2) When all evidence bearing on a particular point was not heard by the tribunal on the day the judgement is pronounced, but it has maintained the memorandum of the evidence adduced by the parties on the previous hearings, duly signed and initialled;

3) The summary of evidence of a particular point has been clearly brought ~~and~~ out, and is not obscure;

4) The reason of the tribunal for preferring the evidence of one party against the other is clearly given in the judgement, and

5) The evidence which is relied <sup>on</sup> in support of a finding is legal evidence. (38)

38) The decision was recorded by Anwarul Haq, Faizullah Khan and Shakirullah Jan, JJ., the judgement delivered by Faizullah Khan, J.

The tribunal constituted under the Electoral College Act is not a court(39).Whereas SS.66 and 67 of the National and Provincial Assemblies(Elections)Act specifically makes the Code of Civil Procedure and the Evidence Act applicable to election petitions filed under it and S.68 gives the tribunal all the powers of a civil court under the Code,the Electoral College Act is silent on the point and the Rules framed thereunder provide that a petition filed under it must be signed and verified as required by the Code of Civil Procedure.This implies that the other provisions of the Code and the Evidence Act are inapplicable.

The tribunal has been described as an administrative

39)In *Shell Company v.Federal Commissioners of Taxation*,1931 A.C.275,the House of Lords,referring to *Rex v.Electricity Commissioners*,(1924)1 K.B.171,as to what is a court,said at p.297,"1)A tribunal is not necessarily a court in<sup>the</sup> strict sense because it gives a final decision;2)Nor because it hears witnesses on oath.3)Nor because two or more contesting parties appear before it between whom it has to decide.4)Nor because it gives a decision which affects rights of subjects.5)Nor because it is a body to which a matter is referred by another body."

tribunal(40), a quasi judicial tribunal(41) and a "special tribunal(42). In whatever way we describe it, it is settled that its function is to decide a lis between contesting candidates and must conform to certain fundamental principles of procedure applicable to a judicial proceeding(43). According to Hbal, J., "it should act in a manner consistent with well recognised principles of justice, equity and fair play".(44). A party must

40) in Abdul Hamid v. Karam Dad, P.L.D. 1966 L. 16.

41) in Dil Md. v. Election Tribunal, P.L.D. 1966 L. 669. Prof. Holland, in his article on the High Courts Control of Inferior Tribunals, published in the Current Legal Problems (1952) has observed, "...that where the case is triangular in involving two parties and a third person as Judge between them, the courts will regard the functions as quasi judicial in nature. Where, however, the statutory power does not involve a triangular situation analogous to that before a court of law, whether the function is regarded as judicial or not depends upon the court's view of the nature of function. If they regard it as analogous to functions conferred upon the courts, involving, for example the condemnation of an offence and the punishment of an offender, then they will hold it to be judicial in nature". In Boulter v. Kent Justices (1897) A.C. 556, it was observed that, a tribunal is judicial if its business is to deal with lis inter partes. In Rex v. Manchester Legal Aid Committee, (1952) 1 All.E.R. 480, it was observed that, "the true view as it seems to us is that the duty to act judicially may arise in widely different circumstances which it would be impossible and indeed inadvisable to define exhaustively".

42) in Md. Akram v. C.A. Saeed, P.L.D. 1965 L. 703.

43) Abdul Aziz v. Provincial Election Authority, P.L.D. 1966 D. 608;  
Md. Yamin v. Election Tribunal, P.L.D. 1968 K. 397.

44) Ghulam Qadir v. Ahmed Shafi, P.L.D. 1967 L. 68.

must be given the opportunity of adducing all relevant evidence and of crossexamining the witnesses of the other side(45) Prescribed forms of procedures are not required to be followed, if in coming to the conclusions the well accepted norms and principles of judicial approach are followed by the tribunal. It should be seen in each case whether the tribunal acted judicially and followed the fundamental rules of fair play and evidence embodied in the principles of natural justice. If it does so, the decision will not be liable to be called in question for failure of natural justice or error of procedure.

It is one thing to say that a tribunal under the Electoral College is invested with very extensive powers to make any order ~~as~~ it may think fit, but quite another to suggest that it can pass any fanciful or capricious order unrelated to the case before it. The "expression "such order as it may think fit" in S.60(2) of the Electoral College Act means according to rule of reason and justice and in accordance with the law; it does not mean in accordance with whimsical, ~~expariense~~ capricious or private opinion. The Legislature has not invested the tribunal with powers of a despot to make an order to satisfy a caprice(46). In Abdul Aziz v. S.A. Chaudhury(47), the tribunal

45) Abdul Hamid v. Karam Dad, P.L.D. 1966 L. 16.

46) so held in Md. Akram v. C.A. Saeed, P.L.D. 1965 L. 703, Dil Md. v. Election Tribunal, P.L.D. 1966 L. 669.

47) P.L.D. 1966 D. 561.

set aside the election of the petitioner on the ground that there "might" have been cases of personation and "in fairness, therefore, it is meet and proper that the election be declared void and a second election held so that there might be a fair strength of trial in the field". The High Court of East Pakistan declared this order as without jurisdiction and observed that, the power to make an order is not "autocratic" but is subject to the provisions of S.60(2) of the Electoral College Act and subrule 1A of r.36 of the Electoral College Rules. The latter provision was held to guide and control the power of the tribunal in the relevant <sup>(48)</sup> respect. It is necessary to examine r.36 (1A). For facility of reference it is reproduced as under:-

"The Tribunal shall declare the election of the returned candidate or the election as a whole to be void if it is satisfied that the result of the election has been materially affected by reason of the failure of any person to comply with, or the contravention of, any provision of the Act or these Rules." (49)

(the underlining is by the author)

It will be observed that an election tribunal must be satisfied that the result of the election is materially affected by reason of non-observance or contravention of a provision of the Act or

48) Ghulam Md. v. Md. Tufail, P.L.D. 1966 L. 576, where this was also held.

49) This subrule was inserted on 16th December, 1964.

the Rules. The satisfaction of the tribunal is absolutely essential(50). Express words to this effect are normally found in the order, although an omission will not always make it liable to be set aside(51). The words "materially affected the result" are very important. So, a contravention of a provision of the Act or Rules, which does not affect the result of the election, will not vitiate an election(52). In Ameer Abdullah v. Md. Yagub(53), the tribunal set aside the election on the ground that certain irregularities had taken place during the election. The High Court observed that the mere commission of corrupt or illegal practice cannot "visit the petitioner with the consequence of his election having been declared void. It has to be proved before succeeding that not only a corrupt practice was current but that it was of such a large scale that it could reasonably be said to have contaminated the entire election"(54). In Abdul Qadoos v. Election Tribunal(55), it was alleged before the election tribunal that the election-petitioner, who had received the second largest number of votes, should be elected instead of the respondent who had received two votes more than him but those votes were illegally cast and should be excluded from the

50) Dil Md. v. Election Tribunal, P.L.D. 1966 L. 669.

51) Sher Md. v. Deputy Commissioner, P.L.D. 1966 P. 153.

52) Md. Shafi v. Election Tribunal, P.L.D. 1966 L. 755.

53) P.L.D. 1967 L. 722. (54) Ibid., at p. 728.

55) P.L.D. 1966 D. 604; decision followed in Abdus Sattar v. S.M. Zaidi, P.L.D. 1968 S.C. 331.

count. The tribunal found that in such a situation it must be held that the result of the election had been materially affected and proceeded to set aside the election. The High Court observed that no exception could be taken to the order of the election tribunal because, on proved facts of the case, "an uncertainty was positively imported into the result of the election, which was thus materially affected". A similar view was taken by Murshed, C.J., in Ananda Bachar v. A.R. Khan (56). In Rashid Ahmed v. Barkat Ali (57), the Supreme Court found that the name of the respondent (elected candidate) was included in the electoral roll, in violation of r.22(3) of the Electoral College Rules, so he was disqualified from contesting the election. It set aside his election but refused to declare the appellant, the candidate with the next highest votes, as elected because "the result of the election has been materially affected and hence the election should be declared as a whole void" (58). So, whether in a particular case the result of the election is materially affected is a question of fact. The order of the tribunal, arriving at such a conclusion, must be based on evidence; otherwise it will be set aside (59).

56) P.L.D. 1967 D. 362.

57) P.L.D. 1968 S.C. 301.

58) *Ibid.* at p. 309. The decision of the Court was based on the grounds (a) that in including the respondent's name, the Registration officer failed to act in accordance with law and (b) voters should not be disenfranchised by electing the appellant.

59) Abdul Aziz v. P.E.A., P.L.D. 1966 D. 608; Haji Khan v. Election Tribunal, P.L.D. 1966 S.C. 301.

The High Court of West Pakistan has commented on rule 36(1A) as follows:-

"It would be wrong to read the subrule in a restrictive sense, that is to say, the tribunal shall not declare the election of the returned candidate or the election as a whole to be void unless it is satisfied that the result of the election has been materially affected by reason of non observance or contravention of any provision of the Act or the Rules framed thereunder. If that had been the real intention, then the rule-maker would have used a negative language." (60)

To the same effect is the observation of the East Pakistan High Court. Murshed, C.J., said,

"The Tribunal must ask itself the further question: What is the effect of this finding on the result of the election itself? Has it "materially affected" the election (as different from has it actually affected the election-for it would be impossible for the tribunal to decide, so the actual result would be an uncertainty). The answer must be "yes" because the facts and circumstances establish, as a certainty, and not as a matter of speculation and surmise, that an uncertainty has been definitely injected into the result of <sup>the</sup> election". (61)

60) Md. Rashid v. Md. Shafi, P.L.D. 1966 L. 947 at pp. 951, 952.

61) Ananda Bachar v. A.R. Khan, P.L.D. 1967 D. 362. It was held that it is not a condition precedent that the result has been materially affected. <sup>at p. 370</sup>



Votes Thrown Away

Indeed, the tribunal is in a difficult position, when the returned candidate is found to be suffering from a disqualification, which may have been unknown to the voters at the time of the election. Should it consider the votes in favour of the returned candidate as wasted, and declare the candidate with the next highest number of votes elected or ought it to declare the election void as a whole? It will have to consider, whether the result of the election has been materially affected in the circumstances.

The matter has been the subject of judicial review in Pakistan.

In Abdur Rashid v. Md. Sadiq (62), three candidates contested an election to the Electoral College. The petitioner (before the High Court) secured 280 votes and was declared elected by the Returning Officer; the other two obtained respectively 216 and 2 votes. The election of the petitioner was set aside by the tribunal on the ground that he was disqualified on nomination day, being under the stipulated age of twenty-five years; at the same time the candidate with the next highest number of votes was declared duly elected. The order was quashed by the High Court. Sajjad Ahmed and Mohammad Gul, JJ., observed as

follows:-

"Having held the petitioner was disqualified to contest the election, being of less than the constitutionally prescribed age, the plain result which followed was that all the 280 voters who had voted for him had cast their votes in vain for no fault of their own, as they had voted for a person whom they considered to be a duly nominated candidate. The learned counsel for the respondent contended that these votes should be treated as destroyed votes, with no effect on the course of the election. This argument would amount to disenfranchising the 280 people who had voted for the petitioner, as if those people are not concerned with the election. In the present case, we feel that, as a disqualified person was allowed to contest the election and he had secured the majority of votes, the result of the entire election was therefore rendered void. The respondent, in spite of securing the highest number of votes could not, under the circumstances, be declared as the duly elected candidate."

(63)

In similar circumstances, a tribunal had set aside the election of the returned candidate (285 votes) and declared the second of

63) Ibid., at pp. 219, 220.

the three candidates, who had received 211 votes, as elected. The latter part of the order was impugned before the High Court. Anwarul Haq and Mohammed Gul, JJ., observed:-

"It cannot be said as to how the 225 voters, who voted for the petitioner, would have cast their votes in the event of the petitioner not being in the field. It is purely a matter of speculation to say that the majority of these votes would have gone to the respondent.....it is a case where the result of the election as a whole had been materially affected."(64)

In Saheb Mia v. S.M. Mia (65), Murshed, C.J., and Abdulla, J., held that, where the returned candidate is not patently and manifestly disqualified, but is found to be disqualified upon investigation, the voters cannot be deemed to have knowingly ~~thrown away~~ away their votes and a tribunal would not be justified in declaring the person securing the next highest votes, as the successful candidate. The course to be followed by the tribunals is aptly expressed by Anwarul Haq, J., in Ahmed v. Mir Md. (66). His Lordship said,

"In the circumstances created by the improper acceptance of the nomination paper and the votes cast in favour of

64) Sana Ullah v. Election Tribunal, P.L.D. 1966 L. 97 at p. 101.

65) P.L.D. 1966 D. 439.

66) P.L.D. 1966 L. 927.

such an ~~election~~ ineligible candidate having been wasted, if the margin of votes between the returned candidate and the candidate with the next highest number of votes is more than the number of wasted votes, then it can be easily said that the result of the election has not been affected at all. But, <sup>however,</sup> if the margin between the returned candidate and the candidate with the next highest number of votes is less than the number of wasted votes, then the question, whether the result of the election has been materially affected or not will have to be answered on the basis of the probabilities as in the very nature, direct and oral evidence as to the manner in which the wasted votes have been cast would neither be available nor it would be generally acceptable in most cases, even if it were available."(67)

The cases cited above have been followed in Ameer Abdullah v. Md. Yaqub(68). The order of the tribunal, declaring the respondent duly elected, was set aside because, "that would amount to disenfranchising the majority of the constituency". Sajjad Ahmed

67) Ibid., at p. 931.

68) P.L.D. 1967 L, 722.

and Ata Ullah Sajjad, JJ., observed:-

"The right of the franchise is to be interfered with very sparingly for very good grounds and people cannot be deprived of their rights of votes because persons among them had committed an illegal practice. The law of elections makes it incumbent for a candidate in order to be able to be returned to secure majority of the votes cast. The rule of majority being the fundamental and over-riding consideration, it cannot be nullified on account of a defect in the election over which the majority had no control". (69)

The latest case on the point is Rashid Ahmed v. Barkat Ali (70). Before the election tribunal the appellant argued that the name of the respondent was included in the electoral roll in violation of subrule (3) of r. 22 of the Electoral College Rules; the tribunal set aside the respondent's election and declared the appellant elected instead. The High Court reversed the order on the ground that the Election Tribunal had no jurisdiction to do so. It relied on S. 13(2) of the Electoral College Act, which provides that an electoral roll is not invalid by reason of any misdescription of a person or by the omission or inclusion of a name in the electoral roll. The Supreme Court, on

69) Ibid., at p. 729 per Atta Ullah Sajjad, J.

70) P.L.D. 1968 S.C. 301.

appeal by special leave, restored the order of the tribunal with regard to the inclusion of the respondent's name in the electoral roll but did not accept the latter part of his order, whereby he declared the appellant elected because he had the next highest votes. The Court relied on the decision of the West Pakistan High Court in Sana Ullah v. Election Tribunal(71) and observed,

"In the instant case the voters could have had no notice of the fact that the inclusion of Barkat Ali's name in the final electoral roll was in violation of ~~the~~ subrule(3) of rule 22. Hence, they cannot be disenfranchised for no fault on their part. Votes given by them without notice of the above disqualification ought to be treated as good votes. As Barkat Ali had majority votes, the minority candidate cannot be ~~seated~~ and ~~therefore cannot be~~ declared elected."(72).

The position that emerges is that votes given, after notice of the disqualification, are to be deducted from the votes of the returned candidate; if the disqualified candidate has a majority of votes the candidate with the fewer votes cannot be ~~declared~~ declared elected; there must be a fresh election.

71) P.L.D. 1966 L. 97, already discussed.

72) P.L.D. 1968 S.C. 301 at p. 309 per Fazle Akbar, J.,

To conclude, an election tribunal under the Electoral College Act and Rules has wide powers to pass any order as long as it is based on sound judicial principles. In Rafiuddin Sharif v. S.M.H. Ali (73), a question arose as to whether the powers of the tribunal include drawing a lot for which no provision is made in the Electoral College Act and Rules. It was held that he can draw a lot to declare the candidate on whom it falls, to be elected to the Electoral College. It was further held that he also possesses the power to recount ballot papers.

#### Election Tribunal under the Assemblies Act

For the trial of election petitions, under the National and Provincial Assemblies (Elections) Act, the Chief Election Commissioner of Pakistan may appoint as many tribunals as he considers necessary. Differing from a tribunal established under the Electoral College Act, a tribunal appointed to hear petitions questioning an illegal return to the Assemblies must consist of people with a sound background of the law and its administration. The Chairman must be a past or present Judge of the High Court or a person who is qualified to be a Judge. One of the other two members must be an Advocate of the High Court, with ten years practice at the bar and the other should have held office as a District or an Additional

District Judge for at least three years(74).A vacancy must be filled by a person with the specified qualifications(75). But if a member is temporarily unable to attend,the trial may proceed before the other two(76).

The Chief Election Commissioner has been specifically empowered to transfer a petition from one tribunal to another, either suo motu or on an application made to him;the tribunal to which the petition is transferred need not start the trial afresh but may recall witnesses already examined(77).

S.68 of the National and Provincial Assemblies(Elections) Act invests the tribunal with all the powers of the civil court and S.66 requires its proceedings <sup>to follow</sup> generally the Code of Civil Procedure and the Evidence Act,but "subject to the provisions of the Act and the Rules".This implies that a tribunal must follow the provisions of the Act and only turn to the Civil Procedure Code and the Evidence Act when there is no relevant provision in the Act or the Rules and when the application of the procedural law in the Code and

74)National and Provincial Assemblies(Elections)Act,S.61(2).

75)Ibid.,S.61(3).

76)Ibid.,S.61 (5).

77)Ibid.,S.62.



the Evidence Act will not lead to any violation of the special law(78).

At the trial issues are to be proved, witnesses summoned and the evidence recorded. A memorandum of the substance of the evidence will normally suffice, but the tribunal for special reasons which ~~cause it~~ to think it necessary to do so, may take the evidence in full (79). A witnesses cannot be permitted to disclose the name of the candidate for whom he has voted but he will not be excused from answering questions, which have a bearing on any matter in issue, on the ground that to answer will incriminate or tend to incriminate or will expose or tend to expose him to a penalty for forfeiture(80). The answer may not, however, be used as an admission against him, except in a proceeding for perjury. If a witness answers all questions truthfully, he may be given a certificate of indemnity, which will be a full and complete defence to a prosecution under the Penal Code, but will not

78) Amir Ata's Case, D.I.E.C 276; Yousaf Ali v. Election Tribunal, P.L.D.1967 P. 207; Md. Hussain v. Md. Khan, P.L.D.1968 J. 95; Umar Jan v. Munawar Khan, P.L.D.1968 J. 100. For further discussion see earlier part of this Chapter, namely Amendment of Election Petition.

79) National and Provincial Assemblies (Elections) Act, S.66(1)(a).

80) Ibid., S.69(2).

relieve him from a disqualification, in connection with an election, under the Act or any other law that may be in force at that time(81). A document which does not comply with the law relating to stamp duty and requisition of documents(82) is nevertheless admissible in evidence(83).

An election contest is a purely statutory proceeding but is an essential part of the democratic process. The entire electorate is vitally interested in seeing that an election held in its constituency is free from every form of unlawful interference and not contaminated by any impurity. So the election tribunal is charged with the statutory obligation not only to preserve the purity of election and freedom right up to the end but also to eradicate the evil consequences of all kind of corrupt and illegal practice, if they are committed while the election is in progress.

The tribunal is competent to enquire into the validity of the nomination of the returned candidate and to ascertain whether he was disqualified from being elected to the seat in question and declare his election void on this ground. The same result should follow, if the election has been procured

82) Ibid., S. 69(3).

82) Namely, the Stamp Act and the Registration Act.

83) National and Provincial Assemblies (Elections) Act, S. 69(1).

or incurred by a corrupt or illegal practice, committed ~~wixh~~ by or with the connivance of the returned candidate or his election agent; the election is liable to be set aside in toto for commission of extensive corrupt or illegal practices.

In order that any other candidate may be declared elected, two conditions must be satisfied. First, a prayer to this effect must be made in the election petition and second, the tribunal must be satisfied that such other candidate is entitled to be declared elected (84). It is not necessary for the tribunal to first declare the election of the returned candidate to be void and then declare the defeated candidate elected. In this context, Mohammed Iqbal, J., has observed:-

"the defeated candidate can claim to be duly elected, if he can show that, after striking out the invalid votes of the returned candidate, he can secure the majority of invalid votes. In such a case, the election of the returned candidate will be declared void. The reason for such declaration is <sup>not</sup> that he was guilty of corrupt practice or illegal practice but because the defeated candidate was held to have secured more votes." (85)

84) Ibid. S. 72(3).

85) Z. H. Lari v. Returning Officer, P. L. D. 1966 J. 13 at p. 35.

The tribunal should declare the election void in toto, if it is satisfied that the result of the election has been materially affected (a) ~~by~~ if there has been a failure of any person to comply with the provisions of the Constitution or the law and (b) if there have been extensive corrupt practices (or illegal practices) at the election. The words "any person" has been judicially interpreted. In Zaffar Ullah v. Md. Hussain (86) it was held that these words are wide enough to include the candidate and voters and for that matter any person connected with the election, who may have failed to comply with the Constitutional provisions or the election law. In Md. Afzal v. Miraj (87), failure on the part of the Returning Officer to comply with the provisions of S.17(1) of the Act was held to have materially affected the result of the election. The expression "failure to comply with the provisions of the... Act and the Rules" in S.72(3)(a) of the National and Provincial Assemblies (Elections) Act came up for interpretation in Moulvi Abdulla v. S. Sher Ali (88). It was alleged that

86) P.L.D.1963 J. 44; the tribunal was dealing with a case under the President's Order, 13 of 1962. Art.27(ii) of the Order correspond with S.72(3) of the 1964 Act.

P.L.D.1967 L. 689.

87) The Returning Officer had misinterpreted the provisions of S.17(1) in allowing respondents 3 to 5 to retire after the time specified for doing so had expired; as a result the first respondent was elected unopposed.

88) P.L.D.1968 J. 79.



that<sup>a</sup> number of corrupt and illegal practices were committed at the instance of one of the candidates. It was proved that there had been a violation of the provisions of S.9 (concerning the powers of the Presiding Officer) and S.28 (ensuring secrecy of the ballot). It was held that it must be proved, as a further condition, that the result of the election had been materially affected thereby. It was observed, "the petitioner had been unable to prove that the result of the election had been materially affected within the meaning of S.72(3) of the Act by reason of such violations" (89). So, it is a ~~corollary~~ corollary to the two conditions stated above that the tribunal should be satisfied that the result of the election, impugned before it, was materially affected.

89) Ibid., at p.90. To the same effect is the decision of the Supreme Court in *Abdus Sattar v. S.M. Zaidi*, P.L.D.1968 S.C.331, and *Rashid Ahmed v. Barkat Ali*, P.L.D.1968 S.C.301; the decisions in *Md. Shafi v. Election Tribunal*, P.L.D.1966 L.755 and *Ameer Abdullah v. Md. Yaquub*, P.L.D.1967 L.722. These cases were decided under the Electoral College Act, and have been discussed under the part of this chapter dealing with Election Tribunal for Elections to the Electoral College ~~xxx~~. The position, especially as regards violation of the provisions of the Act and the Rules, is the same in the Electoral College Act (vide r.36(1A)) and the National and Provincial Assemblies (Elections) Act (see S.72(3)(a)).

### Appeal as to Count of Votes

A tribunal under the National and Provincial Assemblies (Elections) Act has no jurisdiction to decide a dispute relating to the count of votes under S.38. That is within the exclusive competence of the Election Commission or one of its members(90), whose jurisdiction may be invoked by filing an appeal.

The provisions for filing an appeal were, for the first<sup>time</sup> introduced by the Settlement of Disputes (First Elections) Order, 1962 (91). Prior to that the law had been that the entire election disputes, after the election was completed, were dealt with by an election tribunal. By the aforesaid Presidential Order effect had been given to ARTICLE 171(1) of the Constitution and the disputes were divided into disputes relating to the count and other disputes. It provided for an appeal to the Election Commission in a dispute about the count; a petition based on other grounds was to be filed before an election tribunal. The necessity for the introduction of this provision, which is now embodied in the National and Provincial

90) A question has arisen, whether the member of the Election Commission is competent to hear the appeal. It is argued that the appeal should be heard by the Commission as a whole. This matter will be shortly discussed.

91) article 5(3)(b).

Assemblies(Elections)Act,is explained by Ibal,J.,in the following words:-

"The departure from the old procedure, which had been adopted all along in the earlier elections,is a conscious and intentional one.It appears to be for the reason that,disputes about the count can be resolved without enquiry,or at any rate without an elaborate enquiry, whereas other disputes as to corrupt practices,illegal practices or illegal acts cannot ordinarily be resolved until after an elaborate enquiry.The past experience has shown that there has been a considerable delay in the disposal of election disputes before the tribunal.It had been the usual practice that when a person in an election petition raised an objection as to the count, he also raised other objections,and even if the tribunal could decide and dispose of the case on the question of count,it did not do so until it concluded the proceeding about all the issues arising in the case.Even if the petitioner restricted his case only to the count, the returned candidate raised all sorts of question by way of recrimination."(92).

From the above it will be seen that the categorisation was

effected to provide a speedy and expeditious remedy in respect of disputes about the count.

Under ARTICLE 171(1) of the Constitution, provision is required to be made by law "for disputes arising in connection with the counting of votes.....to be determined by the Election Commission, but the Legislature has only provided for appeals in the case of a proceeding disputing the counting of votes under S.38 of the National and Provincial Assemblies (Elections) Act; it has been held that the entire proceedings under S.38 are subject to appeal (93). The question arises whether an appeal lies from a proceeding under S.36, which provides for a preliminary count by the Presiding Officer. In Z.H.Lari v. Returning Officer (94), the dispute related to the count of votes by the Presiding Officer; the Presiding Officer had either excluded or included certain votes in an illegal manner. When this was pointed out to the Returning Officer he refused to go into the question on the ground of lack of jurisdiction. An appeal was preferred to the Member, Election Commission, which was objected to as incompetent on the footing that it was not directed against any proceeding under S.38, but called in question the action of the Presiding Officer under S.36. The learned Member upheld the objection

93) Abdus Sattar v. Chief Election Commissioner, P.L.D. 1968 D. 293.

94) P.L.D. 1966 J. 13.



and remarked that, if the Legislature had provided for an appeal only in respect of proceedings under S.38, it was beyond his power to confer a right of appeal in other cases by inference. The following observation of Mohammad Iqbal, J., is instructive:-

"Article 171 does not by itself confer power in the Commission. It can exercise only those powers as may be conferred on it by an act of the appropriate Legislature. In this view of the matter, the Commission, in dealing with an appeal under S.53, can only exercise the powers which are so conferred on it. The powers under S.53 are restricted to hearing of the appeals in respect of the proceedings under S.38. That being so, even if a question pertains to the count but there is no law made for the Commission, the Commission cannot go into the question."

(95)

Whether the Member can examine the validity of votes in appeal, has been considered in Abdul Hai v. Election Commission (96), a case under the Settlement of Disputes (First Elections) Order, 1962. The petitioner and respondent were candidates for election to the Provincial Assembly of East Pakistan. Each of the two candidates having received the same

95) Ibid., at p. 31.

96) P.L.D. 1964 D. 460.

number of votes, a lot was drawn and the petitioner declared elected. An appeal challenging the count was filed before the Election Commission. The respondent claimed that two of his ballot papers which had been rejected, ought to be counted. The Commission accepted the appeal; it counted both these votes and at the same time rejected another ballot paper of the petitioner. In the High Court it was contended, inter alia, that the Election Commission acted without jurisdiction in going into the question whether a vote is valid or not. The submission was not accepted. Sattar and Chowdhury, JJ., observed:-

"A bare reading of Article 37 of the Order No. 4 (97) makes it clear that, broadly speaking, it provides for counting the votes by the Returning Officer in favour of each of the candidates and it also makes specific provision for a ballot paper to be rejected in certain circumstances and it requires that the Returning Officer must reject a ballot paper when it is found by him to be void in accordance with the provision of law. When article 5(3)(b) (98) speaks of appeal in regard to proceedings under article 37, it provides that the steps taken by the Returning Officer under the said article 37 are subject to an appeal to the Election Commission. There may, therefore, be an appeal against any of the afoesaid acts of the Returning Officer

97) art. 37 of Order 4 of 1962 corresponds to S. 38 of 1964 Act.

98) art. 5(3)(b) of Order 13 of 1962 corresponds to S. 53 of Act of 1964.

one of them being rejection of ballot papers.....The word "counting" involves deciding the question of validity of votes. The power enabling the Commission to count the votes obviously means that it is to count valid votes.....The Commission is to separate the valid votes from void ones and then to count."(99).

The case of Jamal Shah v. Nasarullah Khan(1) may be cited as an example under the Act of 1964. The Presiding Officer rejected (under S.36) twelve ballot papers in which one-rupee currency notes were enclosed, one ballot paper in which part of a five-rupee currency note was enclosed, and one ballot paper in which a paisa (pice) was enclosed on the ground that "each bore a mark by which the elector could be identified". The Returning Officer excluded (under S.38) five other votes for the petitioner, J.S., two of which did not bear initials of the Presiding Officer. Thus out of 252 votes cast in his favour, the Returning Officer after scrutiny rejected nineteen, bringing his count of votes to 233. He reduced the votes of the other candidate (respondent) bringing his number down to 237; the latter was accordingly elected. In appeal under S.53. 99) P.L.D.1964 D.460 at 464.

- 1) P.L.D.165 J.89. This further finds support from the decision in Abdus Sattar v. Chief Election Commissioner, P.L.D.1968 D.293, where it has been held that when S.53 is invoked, the entire proceedings under S.38 become subject of appeal.

the Member, Election Commission allowed one additional vote in favour of M.K., bringing his total to 238 and sixteen in favour of J.S. ( $233+16=249$ ). Fourteen of the additional votes allowed to ~~the appellant~~ J.S. bore the official mark but not the initials of the Presiding Officer. Before the learned Member it was also argued that twelve ballot papers along with chits bearing "Bismillah ar Rehman ir Rahim" should also be rejected on the ground that by the addition of the foreign matter the elector could be identified. The Member held that they were valid votes, for regarded as a mark such foreign objects, i.e., money or the "chits" did not, in the absence of proof of an arrangement between the electors and the candidate, suffice to identify the voters.

The appeal, which must set out the grounds in the form of a memorandum, is to be filed within seven days of the declaration of the result and must be accompanied by a receipt showing that a sum of Rs. 200 has been deposited ~~with~~ towards costs of the petition (2).

The Code of Civil Procedure has been made applicable for the purpose of enforcing attendance of witnesses and

- 2) National and Provincial Assemblies (Elections) Act, S. 53;  
National and Provincial Assemblies (Elections) Rules, r. 23.

examination and for compelling the production of documentary evidence(3).The appellate authority has also been empowered to receive evidence on affidavits and to summon and examine suo motu any person whose evidence appears to be to be material(4).

The powers of the appellate authority are expressed in general terms.After giving an opportunity to the parties concerned of being heard,it may either dismiss the appeal or may proceed to determine the result of the election on the count of valid votes,as aorrected,and make such consequential orders as may be necessary.There is no obligation on its part to call for evidence;the provision with regard to summoning and examining witnesses is merely an enabling provision(5).

There is a difference of opinion between the High Courts of East and West Pakistan,as to whether a Member of the Election Commission,to whom powers have been delegated by the Commission,can hear the appeal under S.53;appeals filed from the 1965 elections have<sup>been</sup> and are still being heard and determined by a Member.In Md.Sharif v.Member,Election Commission(6),it was

4)National and Provincial Assemblies(Elections)Rules,r.23.

5)Z.H.Lari v.Returning Officer,P.L.D.1966 J. 13.

6)P.L.D.1968 L. 219.

argued that ARTICLE 171(1) of the Constitution, which provided for determination of election disputes, provides that disputes ~~for determination~~ as to count should be heard and determined by the Chief Election Commissioner or the Commission as a whole; it does not envisage that a Member of the Commission (other than the Chairman), as a delegate of the Commission, should hear the appeal. The respondent replied that ARTICLE 171(1) of the Constitution envisaged that a law should be made for the determination of election disputes; the National and Provincial Assemblies (Elections) Act was such a law; its S.110 empowered the Commission to delegate its functions to one of its Members or the Chief Election Commissioner. The petitioner, however, contended that S.110, which provided for delegation by law, was opposed to the intention of the Constitution. Reliance was placed on other ARTICLES of the Constitution to contend that, wherever the Constitution intended that a power might be exercised by a delegatee of the functionary, it did so by express delegation; there was no ~~an~~ express provision in the Constitution for delegation of ~~the Commission's power~~ the Commission's power to a Member of the Election Commission. The Lahore High Court remarked that delegation of its functions by an administrative, judicial or quasi judicial authority, which has to deal with a large amount of work, to smaller bodies or persons

is a fully recognised as a legal method. S.A. Mahmood, J., further observed that,

"We are unable to see any indication in Article 171 of the Constitution against the delegation of functions by the Election Commission to its members for disposal of the large amount of work, which the elections to the National and Provincial Assemblies must entail. On the other hand,.....effect must be given to S.110 of the National and Provincial Assemblies (Elections) Act, which has been enacted as required by Article 171. There is, therefore, constitutional backing available in support of S.110.....The vast complexity of the problems involved in the numerous elections to be held under the Constitution necessitate such delegation of functions, without which the elections could not be held and completed expeditiously." (7)

But the Dacca High Court, on a similar argument being addressed before it, took a contrary view in Abdus Sattar v. Chief Election Commissioner (8). The petitioner contended that although S.110 allows powers to be delegated, it is contrary to the

7) Ibid., at p.224.

8) P.L.D.1968 D.293.

mandate of the Constitution and S.53 of the Act. The court held,

"In our opinion the author of the Constitution has given the clearest indication that disputes in question shall be finally determined by the Chief Election Commissioner or the Election Commission, as constituted under Article 153(2) of the Constitution. Our attention has not been drawn to any provision of the Constitution to indicate that in a matter like this an Election Commission has been authorised to delegate its functions to one of its Members. The learned Member of the Commission has, therefore, no jurisdiction or authority to try such a dispute." (9)

It is submitted that this decision of the East Pakistan High Court would have far reaching effects. All orders passed on appeal by the Member, Election Commission, would become without lawful authority and of no legal effect. Since such an order is a nullity, it will not be necessary to have it set aside by the High Court. Surely, the resultant situation would be chaotic. The election authorities would await a pronouncement from the Supreme Court, which would also be eager to decide the matter, in view of the conflicting decisions of the Provincial High Courts. The Dacca High Court granted certificate of appeal to the Supreme Court in view of the importance of the question.

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CHAPTER 9JURISDICTION OF COURTSGeneral

In the last chapter we saw that the Legislature has appointed specified authorities to hear election petitions challenging an election to an Assembly or Electoral College; an appeal relating to the count may only be filed in relation to elections to an Assembly. In earlier chapters it has been observed that the decision of the Appellate Authority on any objections to delimitation of electoral units (1), of the Revising Authority on appeal from the order of a Registration Officer rejecting a claim for inclusion in the electoral roll (2) and of the Appellate Authority from the decision of a Returning Officer refusing to accept a candidate's nomination paper (3), are immune from challenge, except by an election petition, presented in accordance with the Electoral College Act and the Rules framed thereunder. Under S.14 (4) of the National and Provincial Assemblies (Elections) Act a decision to accept a nomination paper is final but an appeal lies if the Returning Officer rejects it and "any order passed on such appeal shall be final" (4). However, a dispute as to the nomination of a candidate may be the subject matter of an election petition under S.67 of the Act. It may be mentioned that the provision

1). Electoral College Rules, r. 4(2).

2). Ibid, r. 14 (4).

3). Electoral College Act, S.24 (5).

4). National and Provincial Assemblies (Elections) Act, S.14 (5).

in S.52 (2) that "no question that can be raised in appeal shall be raised by an election petition" is confined to an appeal under S.53, i.e., in respect of "any proceedings under S.38 relating to the count" and has no reference to the appeal which a Member of the Election Commission hears under S.14 (5) from the decision of a Returning Officer rejecting a candidate's nomination under S.14 (4). But admittedly no petition would be competent if the allegations contained therein fall within the ambit of S.53. S.60 of the Electoral College Act lays down that "the decision of the Tribunal on an election petition shall be final." Similarly S.52 provides that the decision of the Member or the Tribunal (as the case may be ) is final and no questions which may be raised before one can be raised before the other or "any court or authority whatsoever"(5). These provisions appear to take away, not only the jurisdiction of the ordinary civil and criminal courts but also the extraordinary special ~~jurisdiction~~ jurisdiction vested in the Pakistan High Courts; and since such matters may only be taken to the Supreme Court by special leave or upon a certificate granted by the High Court (which is rarely given, unless an important point as to the interpretation of the Constitution arises), a fortiori the Supreme Court would also have no jurisdiction. Although it would have been easier for a High Courts in Pakistan to get

5). National and Provincial Assemblies (Elections) Act,  
S.52(1) &(2).

over this bar to their jurisdiction, if it was contained in the two Acts, on the ground that no such legislation could affect their constitutional jurisdiction to issue writs, the matter becomes seemingly complicated, when one finds that the provisions aforementioned have been enacted in pursuance of the Constitution itself which further contains an express bar in these words: "and no dispute arising in connection with such an election or referendum shall be decided otherwise than under such a law, and the validity of such an election shall not be called in question except in accordance with such a law" (6). It has been held that "a requirement of finality of determination contained in the Constitution is to be placed on a wholly different and certainly at a much higher level than the provisions in Subconstitutional Statutes, giving finality to the determination of Tribunals constituted thereunder"; <sup>a High Court would have no jurisdiction in the former case but</sup> could invoke its superior authority, in the latter case, "to impose upon such Statutory Tribunals..... the requirement that its actions should be within its jurisdiction, that they could not be in defeat of the jurisdiction and that such action should be shown to have been performed with lawful authority" (7).

However, it is significant to note that decisions of election authority have and are being challenged before Superior Courts

6). Constitution of 1962 ART.17(1); this is discussed at p494.

7). Jamal Shah v. Member, Election Commission P.L.D.1966 S.C.1 at p.26 per A.R.Cornelius, C.J.

in Pakistan; the High Courts have shown indulgence and appeals, brought with its leave, have been heard and determined by the Supreme Court. It may be asked, if the Constitution and the law seek to oust the jurisdiction of courts, under what provision of law do these courts assume jurisdiction? Is it a special jurisdiction and is it properly exercised? Is not ARTICLE 171 a complete bar to the jurisdiction of courts under ARTICLE 98? If so, what is the policy behind it? Should the Superior Courts be allowed to interfere and to what extent? These are some of the questions we propose to examine in this chapter, which deals with the Jurisdiction of Superior Courts in Pakistan in election matters.

#### Special Jurisdiction of Superior Courts

ART.130 says that "no Court shall have any jurisdiction that is not conferred by this Constitution or by or under the law". Jurisdiction may be conferred on a High Court in Pakistan by the Constitution or a law or by <sup>both</sup> ~~either~~ of them. Besides the original, appellate and revisional jurisdiction, exercisable by Pakistan High Courts, ART.98 of the Constitution (shortly to be discussed) confers extraordinary jurisdiction in the High Courts. This latter provision is invoked by litigants dissatisfied with decisions of election authorities. For convenience of reference the entire ARTICLE is reproduced, although the discussion will be confined to its provisions which enable us to understand the jurisdiction exercisable in election disputes. It reads -

- " (1) A High Court shall have such jurisdiction as is conferred by this Constitution or by law
- (2) Subject to this Constitution, a High Court of a Province may, if it is satisfied that no other adequate remedy is provided by law -
- (a) on the application of any aggrieved party, make an order -
- (i) directing, a person performing in the Province functions in connection with the affairs of the Centre, the Province or a local authority to refrain from doing that which he is not permitted by law to do or to do that which is required by law to do; or
- (ii) declaring that any act done or proceeding taken in the Province by a person performing functions in connection with the affairs of the Centre, the Province or a local authority has been done or taken without lawful authority and if of no legal effect; or
- (b) on the application of any person, make an order -
- (i) directing that a person in custody in the Province be brought before the High Court so that the Court may satisfy itself that he is not being held in custody without law-fully authority or in an unlawful manner; or
- (ii) requiring a person in the Province holding or purporting to hold a public office to show under what authority of law he claims to hold that office; or

(the underlining is by the author)

(c) on the application of any aggrieved person, make an order giving such directions to any person or authority, including any Government, exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that court as may be appropriate for the enforcement of any of the fundamental rights conferred by Chapter I of part II of this Constitution.

(3) An order shall not be made under Clause (2) of this ARTICLE -

(a) an application made by or in relation to a person in the Defence services of Pakistan in respect of his terms and conditions of service, in respect of any matter arising out of his service or in respect of any action taken in ~~in~~ relation to him as a Member of the Defence Services of Pakistan; or

(b) an application made by or in relation to any other person in the service of Pakistan in respect of his terms and conditions of

service, except a term or condition of service that is specified in t

(the underling is I the author).

this Constitution.

(4) Where -

- (a) an application is made to a High Court for an order under paragraph (a) or paragraph (c) of Clause (2) of this ARTICLE; and
- (b) the Court has any reason to believe that the making of an interim order would have the effect of prejudicing or interfering with the carrying of a public work or of otherwise being harmful to the public interest, the court shall not make an interim order unless the prescribed law officer has been given notice of the application and the court, after the law officer or any person authorised in this behalf has been given an opportunity of being heard, is satisfied that the making of the interim order would not have the effect referred to in paragraph (b) of this clause."

It may be mentioned that, although the ancient names of the writs, which figured in the 1956 Constitution, have been omitted in the 1962 Constitution, the categories mentioned in ART.98 distinguish themselves easily under those names; Clause (a) of sub-article (2) deals with matters covered by the writs of mandamus, Clause (b) refers to the writs of certiorari, and prohibition, Clauses (a) and (b) of sub-article (2) contains the principles applicable to the writs of habeus corpus and quo warranto. The object is to reduce into self-contained propositions in ART.98 what may be regarded as the substance of these writs. In Mehboob Ali v. Province of West Pakistan (8) Manzur Qadir C.J. said,

"Prior to the promulgation of the present Constitution... the scope of those writs was not defined in the Constitution (9) but had to be gathered from the textbooks on the subject and from cases decided in England and other countries, where writs under those names are issued. The present Constitution, by its 98th ARTICLE, appears to have made an attempt to reduce into self-contained propositions that which was regarded as the substance of those writs."

A similar account was given by Kai Kaus J. in Jamal Shah's Case (10)  
His Lordship said,

- 8). P.L.D.1963 L. 575 at p. 577.
- 9). Constitution of 1956; under ART.170 the Court exercised jurisdiction (popularly known as "writ jurisdiction") to issue, in addition to other orders and directions writs in the nature of "mandamus", "prohibition", "Certiorari", and "quo warranto".
- 10), P.L.D. 1966 S.C.1.



"In the 1956 Constitution, jurisdiction for judicial control had been conferred on the High Courts in terms of English writs of Certiorari, Mandamus, etc. Similar was the provision in the Laws (Continuance in Force) Order 1958. The defect in this method of conferment was that, whenever a question arose as to the limits of this jurisdiction, reference had preforce to be made to the scope of various writs in England. The English judgments were not uniform and in fact some of them were hard to reconcile. It was desirable, therefore, that the jurisdiction of the High Court be stated without reference to the English writs and in words which it would not be difficult to construe. This is what I presume the draftsman of the present Constitution attempted to do in ARTICLE 98". (11)

It follows that the High Courts, while exercising jurisdiction under ART.98, are, to a considerable extent, giving constitutional recognition to the writs of mandamus, prohibition, certiorari, habeous corpus and quo warranto and it would be wrong to say that ART.98 confers an altogether new jurisdiction (12). It may appropriately be described as conferring a jurisdiction, which is self-contained and, subject to the provisions contained in the ARTICLE, includes the ancient writs aforementioned; the position with regard to the issue of writs is not the same as under ART.170 of the 1956 Constitution; the scope of some writs have been enlarged and others curtailed (13). For our present study writs of "mandamus", "prohibition", "certiorari" and "quo warranto" only are relevant. In other words, ART.98 should be

11). Cornelius A.R., "Writ Jurisdiction of Superior Courts" reported in P.L.D.1964. Journal 73.

12). As stated by Chauhan, J., in Abdul Aziz v. Md.Ali, P.L.D.1967 L.762.

13). (overleaf).

interpreted with special reference to sub-article (2)(a)(i) and (ii) and sub-article 2(b)(ii); in cases where an election as a whole has been declared void and a for staying the operation of the impugned order, directing a fresh election has been made, Clause (b) of ART 98 (4) will be relevant.

It is significant to point out that the jurisdiction exercisable under ART.98 of the Constitution is subject to the Constitution itself. If elsewhere in the Constitution a bar to the Jurisdiction of the Courts is prescribed, that provision will over-ride the provisions of ART.98 and the Jurisdiction of the Courts would be barred. This has been judicially determined by their Lordships of the Supreme Court in Md. Khan v. Border Allotment Committee (14); in this case the validity of an order, purported to have been made by the Border Allotment Committee, in exercise of powers given under Regulation 9 of 1959 promulgated by the Martial Law Administrator of Zone B, declaring the appellant an undesirable person, who should surrender land in the border belt and leave therefrom, was unsuccessfully challenged before

13). The writ of 'certiorari' was originally available in respect of judicial and quasi-judicial but not administrative Acts, ART.98 has removed the distinction and applies to all Acts. ART.98 may only be invoked if no other adequate remedy exists, a condition normally enforced in 'Mandamus' but relaxable in the case of 'certiorari' (to be shortly discussed).

14). P.L.D.1965 S.C.623.

the High Court. Paragraph 7 of President's Order 26 of 1962 (15) had provided,

"no Court, and, except as provided by this Order, no authority shall call in question the validity, legality or propriety of anything done or any action or proceeding taken in connection with the administration of the Martial Law by any Martial Law Authority or by any person on behalf of the Martial Law Authority during the Martial Law Period." It was held that the Border Allotment Regulation was a valid subsisting law and could competently take away the jurisdiction of the High Court and the Supreme Court, not only to call in question the validity of an order made or direction issued thereunder but also of any provision of the said Regulation. Kaikaus J., in a separate note said,

"The words 'subject to the Constitution' in ART.98 (2) means that the jurisdiction provided for in ART.98(2) can be exercised except, where the Constitution itself creates a bar. No writs can be issued to the President, the Governor or in relation to proceedings in the Legislature on account of certain provisions in the Constitution. The words "subject to the Constitution" had to be inserted in order to make ART.98 (2) consistent with the other provisions in the Constitution, which bar jurisdiction of certain courts in certain matters. The words do not mean subject to the law framed by virtue of the powers granted to a Legislature by the Constitution. The Central Legislature can legislate with respect to the

15). Namely, Martial Law (Pending Proceedings and Protection) Order, 1962.

jurisdiction of courts but the jurisdiction granted by ART.98 is subject only to "this Constitution and the law". A reference to various provisions of the Constitution will show that, whenever it was only the words "subject to this Constitution", it does not mean "subject to the Constitution and the law". Whenever the intention is that a particular provision should be subject, not only to the court but to a law enacted by virtue of powers granted by the Constitution; the Constitution says so." (16)

It may also be noted that the framers of the Constitution have put another proviso to ART.98. It is a condition precedent to the exercise of jurisdiction under any of its provision that the High Court should be satisfied the petitioner has no other adequate remedy provided by law. This provision was not introduced for the first time in 1962; it has always been insisted upon by courts exercising jurisdiction in mandamus but not always in a case for the issue of a writ of certiorari; (17) it was also given effect to in cases arising under the 1956 Constitution. So in Md.Akbar v. Dr.Khan Sahib (18), Constantine and Lari, JJ, held,

"a high court would not ordinarily interfere where any remedy which is

- 16). Md.Khan v. Border Allotment Committee P.L.D.1965 S.C.623 at p.633. His Lordship quoted ARTS.175,177,178,179,101 & 65 as examples to show that a distinction was made between powers which are subject only to the Constitution and those which are subject also to the ~~latter~~ law.
- 17). The Queen v. Joint Stock Companies (1888)2 Q.B.D.131 at p.136; Mehboob Ali v. West Pakistan, P.L.D.1963 L575 at p. 576.
- 18). P.L.D.1957 K.387 at p.395; a case under ART.170 of the 1956 Constitution.

equally convenient is open to the petitioner, but the existence of another remedy is not in every case a bar to the exercise of powers of the High Court under ARTICLE 170 and the courts can and should interfere if the circumstances of the case justify such interference."

The position under the Laws (Continuance in Force) Order 1958, under which High Courts continued to exercise the "writ jurisdiction" conferred by the 1956 Constitution, was the same. The matter assumed importance after the promulgation of the present Constitution, as ART.98 extended the operation of this condition to the writs of quo warranto and habeus corpus as well. Besides, lots of petitions were thrown out by the High Courts on this ground and it called for a judicial pronouncement by the High Court or the Supreme Court. A bench of five Judges, presided over by Chief Justice Manzur Qadir, was constituted to define what is an adequate remedy within the meaning of ART.98 (19). The precise question referred to the Full Bench was:-

"if there is another adequate remedy provided by law, which would in the course of time give adequate relief but the relief would not be available when the petitioner needs it most, is that remedy to be regarded as an adequate remedy or not within the meaning of ARTICLE 98?".

19). Mehboob Ali v. West Pakistan, P.L.D.1963 1575; in this case the post held by the petitioner was abolished by the Municipal Committee, Lahore and he was offered another post. He challenged the authority to alter his terms and conditions of service by a writ petition, where a preliminary objection was raised that as a civil suit was competent the jurisdiction of the High Court under ART.98 was not attracted.

The Court referred to the English and Pakistani cases cited at the bar which "were only of indirect assistance" and observed that the adequacy of the remedy had to be adjudged in relation to a) the nature and extent of <sup>the</sup> relief claimed b) the point of time when the relief would be available and c) the conditions upon which that relief would be available, particularly the conditions relating to the expense and inconvenience involved in obtaining it. The adequacy of an alternative remedy thus depended on and had to be adjudged in relation to the requisite relief. Manzur Qadir, C.J., said,

"if the relief available through the alternative remedy, in its nature or extent, is not what is necessary to give the requisite relief, the alternative remedy is not an 'adequate remedy' within the meaning of ARTICLE 98 and if the relief available through the alternative remedy, in its nature and extent, is what is necessary to give the requisite relief the adequacy of the alternative remedy must further be judged with reference to the comparison of the speed, expense or convenience of obtaining it under ARTICLE 98; but in making this comparison those factors should be excluded which would themselves alter if the remedy under ARTICLE 98 were used as a substitute for the other remedy" (20).

It follows that the existence of another remedy does not automatically take away the High Court's jurisdiction under ARTICLE 98; it is necessary to establish the adequacy or

20). Mehboob Ali v. West Pakistan, P.L.D.1963 L575 at p.581.

inadequacy of that remedy. As the satisfaction of the court is a sine qua non for the exercise of jurisdiction, decisions will continue to differ, in spite of the Full Bench ruling. However, the following points may be laid down for the guidance of courts in Pakistan.

- a) it is necessary to formulate the grievance in a given case as belonging to a general category, and the relief essential to redress that category of grievance must be set out;
- b) it must be seen whether the law prescribes any remedy to redress that category of grievance in the way requested and to the required extent. If there is such a remedy, recourse should be had to it rather than to ARTICLE 98; if it appears that the machinery established for that purpose is not functioning properly, jurisdiction under ARTICLE 98 may be exercised only to such extent as to ensure, as far as it lies within the power of the court, that the machinery begins to function as it should; jurisdiction may also be exercised, if the other remedy, while generally adequate to the relief required for that category of grievance, is not adequate to the relief that is essential in the very special category to which that case belongs; and
- c) in the absence of another remedy to give relief to the required extent or where conditions are attached to such

a remedy, which for a particular category of cases would neutralize or defeat it, so as to deprive it of its substance, relief under ARTICLE 98 should not be refused.

In a recent decision of the Supreme Court in Presiding Officer v. Sadaruddin (21), the facts were these; in a writ petition to challenge the election of a Chairman under the West Pakistan Basic Democracies (Election of Chairman) Rules 1960, the respondent urged that the High Court should decline to exercise jurisdiction in an election matter, especially as an election petition was competent under rule 7; according to the petitioner's rule 7, as originally enacted, merely empowered the Controlling Authority to declare the election void and a fresh election necessary but, as the relief claimed was that ballot papers which had been wrongly rejected, should be counted in his favour and <sup>he</sup> should be declared elected, the remedy by way of election petition was not available to him; it was argued that the subsequent amendment of the rule, which purported to cover the petitioner's case, was of no effect, being prospective and not retrospective in operation; the High Court agreed with the petitioner's submissions, accepted the petition and declared the action of the Presiding Officer illegal. The same objection 21). P.L.D.1967 S.C.569.



was reiterated before the Supreme Court, which observed that incorporated orders and directions in the nature of mandamus, prohibition and certiorari; in relation to those writs it was well established that it is not in the exercise of sound discretion to interfere where there is another adequate and specific remedy, competent to afford relief. The court added:-

"It has often been said that a relief of this nature is a supplementary remedy, which does not supersede legal remedies but rather supplies the want of such a remedy. But it is not any and every kind of remedy which will defeat the constitutional right. In order that the other remedy should be sufficient to warrant refusal to exercise this jurisdiction, it is necessary that the other remedy must be both specific and adequate in the sense that a court must be competent to afford relief upon the very subject matter of the application and be equally convenient, beneficial and effective".  
(22)

As stated earlier, clause (a) ARTICLE 98 (2) contains the essence of the English writ of mandamus and sub-clause (a)(ii) deals with the principles applicable to the writs of certiorari and prohibition. Before a High Court in Pakistan issues an order or direction in the nature of either of the said writs, it must satisfy itself that the application is made by an "aggrieved party" (23). It may be mentioned that this condition was recognised as an essential ingredient for the exercise of that jurisdiction before it was specifically set out in the Constitution. The words "aggrieved party" have been the

22). P.L.D.1967 S.C.569 at p.578; the Court held that, in the case before it, the remedy under ART.98 was appropriate.

23). As will be seen later, this condition does not apply to a writ of quo warrant.

subject of judicial examination by the West Pakistan High Court in Hamida Begum v. Provincial Election Authority (24); in that case a number of female voters challenged an election on the ground that they had been deprived of their right of franchise by virtue of an agreement arrived at between the contesting candidates that the ladies should not go to the poll. The court held that the right to challenge the election was conferred by law on candidates alone; it was not the inherent right of every citizen and therefore the petitioners were not aggrieved persons within the meaning of ARTICLE 98. A similar view was later expressed by the court in Leghari's Case (25).

The writ of mandamus is an order to an inferior authority requiring it to do something which it is by law obliged to do and which it has failed to do. As the output of the legislatures in the Indo-Pakistan subcontinent increased with the passage of time, legislation tended to ~~create an increasing number of~~ <sup>tribunals</sup> and it was not uncommon for statutory powers to be given <sup>to them</sup> / subject to numerous conditions governing their exercise. Consequently the Superior Courts were required to define the principles governing the exercise of such power. These principles (shortly to be stated) are now well established and have also found judicial recognition by Courts in Pakistan.

24). P.L.D.1966 L.560.

25). Leghari, A.M.K. v Government of Pakistan, P.L.D.1967 L. 227.

In Masaudul Hasan v. Khadim (26) mandamus was sought to remove forthwith the first respondent from membership of Pind Dadan Town Committee on the ground that he had been dismissed from Government service, which entailed a disqualification under Art. 25 (2) (a) of the Basic Democracies Order, read with its Second Schedule paragraph 2 of Part II. The High Court found that the order of dismissal was a nullity and dismissed the writ petition. On appeal to the Supreme Court, the scope of the writ of mandamus was discussed, as one of the issues was "whether it is appropriate that in a writ of mandamus, a finding of the type affecting the validity of an order made by an authority, which was not party to the case, can be permitted." The Supreme Court considered the principles applicable to the issue of mandamus in England (27) and laid down as under:-

- (i) an applicant for an order of mandamus must show that there resides in him a legal right to the performance of a legal duty by the party against whom the mandamus is sought;
- (ii) in order that mandamus may issue to compel something to be done under a statute, it must be shown that the statute imposed a legal duty;
- (iii) it is only in respect of a legal right that mandamus will issue; and

26). P.L.D.1963 S.C.203.

27). As set out in Halsbury's Laws of England (Third edition) Vol. II, Sec. 345; in England mandamus was, inter alia, used for the purpose of compelling conferment or restoration to office; the power to issue mandamus covered practically the entire field of local Government and even included such authorities as universities.

- (iv) the legal right to enforce the performance of a duty must be in the applicant himself. The court will therefore only enforce the performance of statutory duty by public bodies on the application of a person who can show that he himself has a legal right to insist on such performance.

Mandamus is thus a remedy for illegal executive acts and omissions; it will issue if the petitioner establishes that an act done or intended or an omission by an authority in his public capacity has infringed or is calculated to infringe his personal or fundamental right and that the forbearance or act, which he wishes the court to command, is duly imposed by law.

Prohibition and certiorari are intended to control the activities of public authorities exercising judicial, quasi judicial and administrative functions. The former is appropriate to arrest pending proceedings and the latter to quash proceedings, which have been completed. In ARTICLE 98 (2)(a)(ii) it is stated that the High Court will exercise jurisdiction, if the action of the impugned authority is without lawful authority and consequently of no legal effect. It would appear that an action could be impugned by reference to the statutory powers under which the authority acted and the nature and scope of the authority's power. So Cornelius, C.J., in Jamal Shah v. Member Election Commission (28) said, 28). P.L.D. 1966 S.C.l. at p. 39.

"the authority conferred by the relevant law is not to be confined for the purpose of exercise of power under ARTICLE 98., but it is only after the terms used in the relevant law have been given their fullest effect for ascertaining the authority thereby conferred that anything done beyond or in excess of the authority may be brought within the power of avoidance vested in the High Court".

It is necessary to examine the various interpretations placed by courts in Pakistan on the words "lawful authority" and "without lawful authority", to find out the true meaning of the latter expression. In Badarul Haq v. Election Tribunal (29) the question when an act of a judicial or quasi judicial authority would constitute an act performed "without lawful authority", was considered; it had been argued that the Tribunal had taken into account inadmissible evidence and misinterpreted the provisions of the Representation of the People Act, 1957. With regard to the former the majority view was that it did not invalidate the Tribunal's order as "it will be going too far to say that every little breach of a rule allowing evidence to come in, which in strict law might. 29). P.L.D. 1963 S.C.704.

be thought inadmissible would constitute an act without lawful authority" but according to Kaikaus J., who appended a separate note, admission of evidence not permitted by the Evidence Act would invalidate the proceedings, if the wrongful admission affected the finding of the Tribunal. As to the latter argument, his Lordship said,

"The proposition is indisputable that, where there is jurisdiction to decide a particular matter, there is jurisdiction to decide if rightly or wrongly and the fact that the decision is incorrect does not render the decision without jurisdiction. I do not see any difference in a case where the question of law decided is a matter on which two opinions can easily be held and the case where the decision on a question of law appears to be clearly erroneous." (294)

This view was maintained by his Lordship in Jamal Shah's Case (30). It was also stated,

"If it be accepted that a wrong decision on a question of law renders an act 'without lawful authority' the High Court would be converted into a court of Second Appeal (as under S.100 of the Code of Civil Procedure) in respect of all orders passed by any judicial or quasi judicial tribunal and S.115 of that Code, which grants the High Court power of revision would, on this interpretation of ARTICLE 98 become useless.....If a wrong conclusion on a question of law is a conclusion reached without lawful authority, there is no reason why a wrong conclusion on a question of fact should also not be without lawful authority for the defect in both cases consists in the mistake in the

299). *Ibid.*, at p. 736.

30). P.L.D. 1966 S.C.1 at p. 51.

conclusion reached, the exercise of power of decision being in each case perfectly lawful".

Yaqub Ali, J., expressed his view thus -

"an act done or proceeding taken would be with lawful authority, if the person performing the function is invested with the necessary capacity and the conditions for the exercise of that authority are substantially complied with, except where there be found disqualification by bias or fraud *ex mala*". (30a)

It may be mentioned that although Cornelius, C.J., in his judgement said, " 'lawful authority' in relation to a jurisdiction, which is exercised by tribunals in a field which may be described as foreign, necessarily includes the resolution of all questions of law, including question of interpretation of the relevant law and all questions of fact arising for determination",

His Lordship was in agreement with the majority view that a wrong interpretation of law does not constitute an act without lawful authority; this view has been subsequently upheld by the Supreme Court (31) and followed by the High Court (32).

It follows that the expression "lawful authority", in the respect of judicial and quasi judicial tribunals means 'with jurisdiction', so that only excess of jurisdiction or failure to exercise jurisdiction would amount to an act 'without lawful authority'. It has been held that there is no distinction between

30a) *Ibid.*, at p. 71.

31). Province of East Pakistan v. Md. Yaseen P.L.D.1966 S.C.438.

32). Md. Hussain v. Addl D.J., P.L.D.1966 L.128; Md. Rasheed v. Md. Shafi, P.L.D.1966 L.947.

an error of law and failure to exercise jurisdiction on the part of an administrative authority (33) and an error of law committed by such authority would fall within the mischief of the expression 'without lawful authority' in ARTICLE 98.

The writ under ARTICLE 98 2(a)(ii) covers and goes beyond the scope of the writs of prohibition and certiorari in that it is not confined to the correction of judicial and quasi judicial orders but also extends to orders of an administrative nature, which are made without lawful authority. The Court hearing the writ <sup>- petition</sup> acts in a supervisory capacity. It will enquire whether there has been a defect of jurisdiction, absence, excess or abuse of jurisdiction or its wrongful exercise or refusal; whether an impugned order has been procured by fraud, <sup>whether</sup> a discretion vested in the authority has ~~not~~ been judicially exercised, whether the authority has acted ~~with~~ mala fide; whether there is an error apparent on the face of the record; whether there is any evidence to support a finding ~~and~~ whether the rules of natural justice have been infringed (34). It may be mentioned that the power to issue writs lies in the discretion of the court and the relief which can be obtained is an equitable relief (35); so a High Court will decline to

33). Jamal Shah v. Member Election Commission, P.L.D.1966 SC1.

34). Maulana Maudoodi v. Government, P.L.D.1965 S.C.673; Province of E.Pakistan v. Nur Ahmed, P.L.D.1964 SC.451; Manzurul Haq v. Controlling Athy, P.L.D.1963 S.C.652; Faridson v. Government, P.L.D.1961, S.C.537; Chief Comm. Karachi v. Mrs. Sohrab, P.L.D.1959 S.C.45; Khushi Md. v. Commissioner Multan, P.L.D.1965 L.250.

35). As described in Abdul Aziz v. Md. Ali, P.L.D.1967 L.762.



exercise its discretion in the following cases:-

- i) if the applicant withholds material facts and makes deliberate and false representation or is guilty of fraud; the reason is two fold: to prevent an abuse of the process of the court and that he who seeks equity must come with clean hands (36),
- ii) if the applicant was himself instrumental or actively participated in the illegality of which he complains (37),
- iii) if the applicant acquiesced in the proceedings before the inferior authority, as acquiescence is a bar to the charge of irregular procedure and irregular assumption or exercise of jurisdiction (38),
- iv) if the applicant is guilty of laches and delay (39),
- v) if the applicant wishes to succeed not on the strength of his own title but on the weakness of his adversary, and cannot benefit by the Court's order (40),
- vi) if the setting aside of the impugned order would be inequitable; for a court cannot act in aid of injustice (41),
- vii) if the order of the court could be defeated or rendered brutum fulmen by the respondent authority (42);

- 36). Sind Industrial Trading Co.v. First Assistant Judge, P.L.D.1960; K.826; Dalmia Cement Co. v. District Board Karachi, P.L.D.1958 K. 211; Ahmed Khan v. Custodian, P.L.D. 1963 K.450.
- 37). Ghulam Mohiyuddin v. Chief Settlement Commissioner, P.L.D. 1964 S.C.829; in this case the appellant filed a revision petition as also a review petition under the Displaced Persons (Compensation and Rehabilitation) Act, 1958; when the decision of the revising authority went against him he tried to contend that the review proceedings were incompetent and without jurisdiction; but the Supreme Court declined to grant him the relief because he had assisted in the commission of the illegality.
- 38). Shamsul v. Mit Ghulam, P.L.D.1963 K.588; Phool Md. v. Chief Settlement Commissioner, P.L.D.1966 K.146; Md.Rafique v. Addl Commissioner & Election Tribunal, Hyderabad, P.L.D.1966 K. 434.

It must also be observed that a High Court under ARTICLE 98 is not empowered to interfere with a finding of fact or enquire into the sufficiency or insufficiency of evidence (43). But if a tribunal of exclusive jurisdiction has given a finding of fact on the assumption that a piece of evidence exists, which does not, or has ignored evidence which should have been taken into consideration or has misread any material part of the evidence, the order would be made without jurisdiction and a writ could issue (44).

- 39). Abdul Aziz v. Md. Ali, P.L.D.1957 L.762; Dalmia Cement Co. v. Superintendent of Taxes, P.L.D.1964 K.203;
- 40). Mashullah v. Chief Settlement Commissioner, P.L.D.1965 L.672; e.g; where a petitioner has no right or title but he wants to challenge the title of the respondent.
- 41). Md. Tufail v. Md.Ziaullah, P.L.D.1965 S.C.269.
- 42). Sh. Rehmat Ullah v. Dy.Settlement Commissioner, P.L.D.1963 S.C.633; Maulana Maudoodi, P.L.D.1964 K. 478.
- 43). Sikander v. Mian Abdul, P.L.D.1963 K.219; Md.Salim v. Land Commissioner, P.L.D.1964 B.J.15; Pakistan Tobacco Co. v. Karachi Municipal Corporation, P.L.D.1964 K.468.
- 44). Md. Aslam v. Collector, Lahore P.L.D.1962 L.124 at p128; Habibullah v. Election Tribunal, P.L.D.1962 L.797 at p.803.

It will not allow a new point to be raised for the first time before it, whether it be a question of law or of jurisdiction (45). A case based on mala fides should set out a specific case (46); so it was observed in Md. Akram's Case (47), "notwithstanding the fact that the circumstances relied upon by the petitioner tend to create doubt in one's mind as to the bona fides of the proceedings, the matter rests on mere suspicion only and it is not possible to record a finding on the basis of suspicion, however strong it might be".

Finally, although it is undisputable that a Superior Court acting under ARTICLE 98 has full power to do justice, it must not substitute its own finding for that of the inferior authority or tribunal; in cases where certain questions had been left undetermined by the authority or where fresh evidence is called for, the High Court should quash the impugned order and remand the case for disposal according to law (48).

- 45). Ghulam Mohiyuddin v. Chief Settlement Commissioner, P.L.D.1964 S.C.829. In Karam Dad v. Yagub, P.L.D.1965 L.622 the point as regards the Tribunal's jurisdiction to go into the decision of the Returning Officer, accepting the nomination paper, was not taken before the Tribunal but was made a ground of petition before the High Court; as the petition had been admitted to regular hearing on that point, it was allowed to be argued.
- 46). Md. Abdus v. Chairman, East Pakistan Election Authority, P.L.D.1965 D. 231.
- 47). P.L.D.1965 L.703 at p.706.
- 48). Azmat Ali v. Settlement Commissioner, P.L.D.1964 S.C.26; Md. Aslam v. Collector, P.L.D.1962 L.124.

Continuing with the examination of ARTICLE 98, Clause (ii) of Sub-article 2 (b) empowers the High Court, on the application of any person, to make an order requiring a person, purporting to hold public office in the Province, to show under what authority of law he claims to do so. It may be observed that on application for "quo warranto" differs from the other writs except habeas corpus in that an application therefore need not be by an aggrieved person; this has been judicially established in Md Khan v. Lahore Cantonment Board (49). But the Court must see that the relator is a fit person to agitate the matter having regard to his conduct and motive, before issuing the writ (50). The equitable principles set out above in connection with the writs apply to a writ of quo warranto except that a petition for quo warranto cannot be defeated on the ground of laches and delay if the disqualification alleged is of a continuing nature (51). Although it was previously possible to argue that a writ of quo warranto should issue notwithstanding the existence of another remedy, like the election petition to question the status of a Member of an Assembly, with the coming into force of the 1962 Constitution, this was expressly prohibited. A proviso has now been placed on the entire ARTICLE and it is a condition precedent for 49). P.L.D.1964 L.125.

50). Md.Ali v Md. Bashir, P.L.D.1962 L. 230.

51). Ibid, at p. 241,

assumption of jurisdiction under ARTICLE 98 that there is no adequate remedy available to the petitioner. This has already been discussed in the light of the full Bench decision of the West Pakistan High Court in Mehboob Ali's Case(52).

It may be pointed out that a High Court under ARTICLE 98 has the power to issue interim injunctions during the pendency of the main petition but it would normally refuse to stay election proceedings or direct the holding of a fresh election. The reason is that it is in the interest of the general public that the composition of the Legislatures should be speedily determined. As the disposal of the petition takes a long time, it is unfair that a certain section of the people should not have a representative in the Assembly.

A full Bench of the West Pakistan High Court in Arif Iftikhar v. Election Tribunal(52a) held that, an application for an interim order on an election petition should not ordinarily be granted without notice to the opposite party and the law officer concerned. It could be granted

52). P.L.D.1963 L.575.

52a). P.L.D.1968 L.1387.

if it were shown that the tribunal has acted without jurisdiction or has not performed a duty prescribed by law or has ignored the principles of natural justice or where there is an error of law patent on the face of the record. It should not be granted on the ground that the tribunal has not properly exercised its discretion or for errors of law not affecting jurisdiction.

From the above discussion we conceive that ARTICLE 98 of the CONSTITUTION confers a "special jurisdiction" on the High Court. This jurisdiction has also been described by the learned Judges of the Superior Courts in Pakistan as the "Constitutional jurisdiction" or the "extraordinary jurisdiction" of the High Court; but the former description is more appropriate as the Constitution itself has also conferred other jurisdictions on this court, for example ARTICLE 123, which gives the High Courts in Pakistan power to punish contemnors for their contempt. It must be remembered that, apart from the fact the essence of the ancient writs has been maintained and the rules concerning them may in appropriate cases be applied by Pakistan Courts, the

jurisdiction under ARTICLE 98 must be exercised strictly in accordance with the requirements of that ARTICLE. In this context it may be said that ARTICLE 98 is a new provision and comes as a matter of first conferment by the present Constitution; so any assumption that the power thereunder is something inherent in the High Courts or of an origin earlier than the 1962 Constitution cannot be supported.

Interference in Election Matters

Having examined the nature of the High Courts' jurisdiction under ARTICLE 98 it may be asked: if this jurisdiction is invoked in election matters, is it properly exercised? This brings us to ARTICLE 171, which was briefly referred to in the beginning of this chapter, but a more detailed examination of its provisions now appears to be desirable. It is reproduced for facility of interpretation:-

"

1. Subject to Clause (2) of this ARTICLE provision may be made by law -

a) for disputes arising in connection with the counting of votes at an election or referendum required under this Constitution to be finally determined by the Commissioner or the Election Commission and

b) for other disputes arising in connection with such an election or referendum to be finally determined by a tribunal established for that purpose and no dispute arising in connection with such an election shall be decided otherwise than under such a law, and the validity of such an election shall not be called in question except in accordance with such a law.

- 2). When a person has been declared to have been elected as a President, the validity of such an election shall not be called in question in any manner or by any court or authority whatsoever.
- 3). The validity of anything done by the Commissioner under ARTICLE 160, 161 or 162 shall not be called in question in any manner before any court or authority whatsoever.

(the underlining is by the author).

It will be observed that ARTICLE 171 contains provisions in respect of disputes concerning elections held under the Constitution; Clause (1) purports to deal with disputes relating to elections to the Electoral College and the Assemblies; Clause (2) provides that the validity of a presidential election is not open to question in any manner or by any authority whatever; Clause (3) prohibits the questioning of demarcation of central and provincial constituencies and reserved zones for women candidates, in respect of an election to the Assembly. Under ARTICLE 171 (1) the Legislatures is to provide for and constitute different authorities to deal with disputes as to the "count of votes" and "other disputes"; their determinations are to be in accordance with the law specifically made for that purpose and are to be final. The Electoral College Act, 1964 and the National and Provincial Assemblies (Elections) Act, 1964 and the rules framed under them, have been enacted in pursuance of ARTICLE 171 (1) of the Constitution, so that the words "such a law" therein have a clear reference to the enactments of the Central Legislature. The words "finally determined" have been the subject of judicial



examination in Jamal Shah v. Member Election Commission (53).

Kaikaus J said,

"in some contexts the word 'final' may only mean that it was not open to appeal or revision etc; but when the Constitution says that a law should be enacted by which disputes are to be finally determined, I am unable to see what other intention can be imputed to the framer of the Constitution except that the determination under the law was not to be challenged".

It would thus seem that the determination of election disputes has been placed within the exclusive jurisdiction of election authorities; the view is emphasised by the words "no such disputes arising in connection with such an election shall be decided otherwise than under such a law" and "the validity of such an election shall not be called in question except in accordance with such a law". But the matter is not so simple as it seems and this interpretation, it is submitted, can be open to the following arguments: -

1. ARTICLE 171 (1) makes it incumbent on the Legislature to make laws (a) for disputes as to the "count of votes" and (b) "other disputes", in connection with an election under the Constitution to be finally determined by the Commission or the Tribunal, as the case may be. Now whereas the National and Provincial Assemblies (Elections) Act has been enacted in strict compliance

with this provision of the Constitution, the Electoral College Act is not; no distinction has been made by the Legislature between disputes as to the count and other disputes and the only authority competent to hear election petitions, in respect of Electoral College Elections, is the Tribunal constituted under S.59; moreover under S.58 an election to the Electoral College may only be "called in question by an election petition under subsection (2)". So in a case where an Election Tribunal determines a dispute as to the count of votes at an Electoral College election, its order would not be sacrosanct and the bar to jurisdiction stipulated in ARTICLE 171 (1) would not apply, as the dispute cannot be said to be determined in accordance with a law envisaged by it; this finds support from the decisions of the West Pakistan High Court in Dil Md. v. Election Tribunal (54) and Md. Ibrahim v. Election Tribunal (55).

- 2). Sub-article (2) deals with the election of the President - and prohibits the validity of that election to be called in question "in any manner before or by any court or authority whatsoever"; subarticle (3), under which the validity of anything done by the Commissioner in delimiting the constituencies, and arranging zones for women

54). P, L. D. 1966 L. 669.

55). P.L.D. 1966 L. 794 .

candidates cannot be called in question is similarly worded. A comparison of the language used in subarticle (1) with that employed in subarticles (2) and (3) indicates that the latter clauses are couched in strong words like "in any manner" and "court or authority whatsoever" but have been deliberately omitted from the former clause. The submission is that whereas ARTICLE 171 (2) and (3) contemplates an absolute bar to the jurisdiction of counts, such interpretation cannot be placed on ARTICLE 171 (1). It is possible to argue that the ARTICLE 171 (1) appears in its present form because the determination of the initial authorities designated in it are subject to appeal in certain cases, and the Election Tribunals in others, made immune only from the incidence of the supervisory jurisdiction of the High Court under ARTICLE 98. Be as it may, the construction of subarticle (1) is open to the interpretation aforementioned and the doubt could have been well removed by the framers of the Constitution.

- 3). The third argument is of considerably lesser force and depends on the interpretation of the word "election": whether ARTICLE 171 (1) applies to a completed election? In other words, whether the High Court's jurisdiction can be invoked with regard to a pre-election stage,

such as disputes relating to nomination of a candidate? The view expressed by Orcheson, J., in Fazal v. Chaudry Md. Hussain (56) was in the affirmative; but this is not good law in view of the pronouncement of a larger Bench of the West Pakistan High Court in Dost Md. v. Returning Officer (57) and it is settled law that the term election embraces the entire process of election and not merely the taking of the poll and subsequent declaration of the result. So this argument is no longer available.

But there is indeed a formidable barrier to the intervention of courts. While examining ARTICLE 98 it was observed that the jurisdiction conferred by it is expressly made subject to the Constitution (58). This implies that ARTICLE 98 is subject to ARTICLE 171 and both provisions should be read in conjunction with each other. So if ARTICLE 171 purports to take away the jurisdiction of the Courts, ARTICLE 98 cannot be invoked by the High Court in election matters. Does ARTICLE 171 then destroy the jurisdiction of the High Court under ARTICLE 98? In the judgement of Kaikus J in Jamal Shah v. Member Election Commission (59) we find the following observation:-

56). P.L.D.1964 L. 74.

57). = P.L.D. 1965 L. 560.

58). See footnote 14 of this Chapter, p.494-495.

59). P.L.D. 1966 S.C.L. at p. 57.

"ARTICLE 171 provides for the decision of election disputes in a certain manner and the High Court can always interfere under ARTICLE 98 in enforcement of ARTICLE 171 and the law enacted by virtue of that ARTICLE".

It follows that courts in Pakistan are disposed to interfere in election matters and in the next few pages our task will be first to examine the salient cases on the subject and then to deduce or formulate the rule which may be adopted by courts in future.

Disputes in connection with elections to the Electoral College and the Assemblies were brought before the High Courts either directly or after the remedy provided under the statutes had been exhausted. A short ground for dismissal could be that another remedy existed which must be resorted to in the first instance; if there was no remedy provided in the Acts or the Authority empowered to decide them had not been constituted, jurisdiction was invariably exercised; but the position was far from being settled. ARTICLE 171 created a prima facie bar to the Courts jurisdiction and confusing decisions were unavoidable. Where the bar to jurisdiction was specifically taken in the pleadings, the High Court refused to interfere, unless it invoked the general principles applicable to the writ jurisdiction of Superior Courts; it is submitted that this is wrong, for <sup>the view that the Pakistan Courts have</sup> ~~it is clear we have seen that~~ the only jurisdiction exercisable

by the King's Bench and the Queen's Bench in England to issue writs is unwarranted. Yet in some cases the Court placed reliance on a principle, which was not strictly applicable, that jurisdiction should be refused in election matters, as they belonged to the Parliamentary jurisdiction and, if they interfered, they would usurp that jurisdiction; this principle though referred to in subsequent judgements (60), based on certain English decisions (61), has been held not to take away the Constitutional jurisdiction, that is, if the case otherwise falls within the scope of ARTICLE 98, as truly interpreted. It is not necessary to formulate decisions in which conflicting views were taken, as they do not lay down a principle of law; suffice it to say that the chaotic state of affairs, under which the rights of the citizen were being lightly brushed aside, called for an authoritative pronouncement from one of the Superior Courts. Consequently a Bench of three learned Judges was constituted in 1965. The case is cited as Dost Md. v. Returning Officer (62) and may be called the first milestone in the history of disputes under the present election laws. In that case the disputes related to the stages before and after the election;

- 60). Imtiaz Ahmed v. Ghulam Ali, P.L.D.1963 S.C.382; Dost Md. v. Returning Officer, P.L.D.1965 L.560; Jamal Shah v. Member Election Commission, P.L.D.1966 S.C.1., per Cornelius, C.J., and Yaqub Ali, J.
- 61). Strickland v. Grima, 1930 A.C. 285; Theberge v. Laudy, (1876) 2A.C.102; Edward Lionel Senanayake v. Herath, (1954) A.C.640.
- 62). P.L.D. 1965 L. 560.

two petitions complained against nominations (63) and the third stated that eight ballot papers had been wrongly invalidated by the Presiding Officer; the disputes concerned elections to the Electoral College. ARTICLE 171 and S.58 of the Electoral College Act, enacted in obedience to it, made the decision of the election authorities final, except by a petition to the Election Tribunal, which in turn was not open to question. The question, therefore, referred to the Full Bench was: "whether the provisions of ARTICLE 171 of the Constitution and S.58 of the Electoral College Act excluded the jurisdiction of High Court under ARTICLE 98 of the Constitution"?

At the very outset the importance of the question raised was stated thus:

"The question has often been debated in one form or another in the Superior Courts of this country as well as courts of foreign jurisdiction leading to certain statements of law on the point; but on this occasion the provision made for determination of disputes arising in connection with an election under the Electoral College Act, and the terms in which ARTICLE 171 of the Constitution is couched has added to its complexity".

- 63). It may be pointed out that at the time of making the writ petition the Election Tribunal had not been constituted; again whereas there is an appeal from an order rejecting a nomination paper, there is none in the case of its acceptance by the Returning Officer; one of the petitions urged that the respondent, though disqualified on a finding of corrupt or illegal practice against him (S.53 (i)(j)), had been nominated.

On the basis of Wolverhampton New Water Works Co. v. Hawkesford (64), which was approved by the House of Lords in Neville v. London 'Express' Newspaper Ltd.(65) and reaffirmed by the Privy Council in Attorney General v. Gordon Grant and Co.(66), it was argued that where a right is created by the Statute, which at the same time gives a special and particular remedy for enforcing it, the remedy provided by the Statute must be followed; and it is not competent to the party to petition to the High Court under ARTICLE 98, when the Electoral College Act provided a remedy by way of election petition. The Court observed that the rule was not absolute and an exception could be made where, and until such time as, the remedy provided for in the Statute for establishment of that right is made available. It was also argued that the disputes in connection with an election lie within the domain of the Legislature and, if by law it delegates its functions to another forum, that forum alone will have the jurisdiction to decide them and the jurisdiction of the Civil Courts, including the jurisdiction of Superior Courts to issue prerogative writs, is excluded. The Court, however, found this submission hard to digest. It was said, -

64). (1889) 6 C.B. (New Series) 336.

65). (1919) A.C. 368.

66). (1935) A.C. 532.



"it is difficult to concur with the view that rights founded on statute can be rendered negatory by omission on the part of the executive authorities to set up Tribunals for their enforcement. Civil rights, common law rights or rights founded on statute may differ in their origin and to establish them different forms may be provided; but it is a negation of a right to say that it will adorn the statute book until by the will of a functionary of the State a forum is provided for its establishment... We are, therefore, inclined to agree with the opposite view that in such a case a person has a right to find recourse to a Civil Court or to invoke the writ jurisdiction of Superior Courts where it so exists". (67).

The Court, after a careful interpretation of ARTICLE 171, came to the conclusion that the ouster of the court's jurisdiction was not absolute for it asked: What if the authority is not appointed or if appointee refuses or neglects to exercise the jurisdiction conferred on it or acts in excess of its jurisdiction? Yaqub Ali, J. said:-

"if the establishment of the right is made dependent on the existence of the authority named in ARTICLE 171, it will amount to destroying that right and that such interpretation should be avoided we are in no doubt. A contrary view, which may be adopted in complete fairness to the provisions of ARTICLE 171, is that the exclusion of the jurisdiction of the courts is subject to the fulfilment of the conditions laid down in the ARTICLE, namely, appointment of a Commissioner,

67). Dost Md. v. Returning Officer, P.L.D.1965 L. 560 at p.567.

an Election Commission and a Tribunal, with ample jurisdiction to decide all kinds of disputes which may arise in connection with an election held under the Constitution. In other words the electoral right conferred by the Constitution partakes of the same nature as civil rights and common law rights and their establishment in all circumstances is not dependent on the functioning of the authorities named in the ARTICLE. ~~A fortiori~~ A fortiori in cases in which the authority declines or neglects to perform its functions properly, a petition under ARTICLE 98 will lie to the High Court for determining the legality of the act done or proceeding taken and issuing directions to the Authority to do that which it is required by law to do. It may be added that such excuse of jurisdiction in the High Court will not conflict with the provisions of ARTICLE 171 that election disputes will be determined finally by the authorities named in it." (67a).

The Court referred to an earlier decision of the Pakistan ~~Supreme~~ Supreme Court in Imtiaz v. Ahmed v. Ghulam Ali (68) to emphasize that it is desirable that ordinarily courts should, in exercise of their writ jurisdiction, decline to interfere in disputed election, in order that an election should as soon as possible become final and conclusive and that the Constitution of the Legislatures be speedily and distinctly known but it pointed out that it was subject to these exceptions:-

67a). *Ibid.*, at p. 568.

68). P.L.D. 1963 S.C.382.

- a) if there is a manifest defect of jurisdiction in the Tribunal;
- b) if there is manifest fraud in the party procuring the order complained of;
- c) if the authority making the order has acted mala fide and
- d) if there is an error on the face of the record.

It will be observed that the exceptions stipulated above, form necessary ingredients of certiorari to issue and have already been discussed above.

Thus the case of Dost Mohammed(69) for the first time, since the promulgation of the Constitution, made it clear that the interpretation to be placed on ARTICLE 171 (1) was different from what<sup>it</sup> appeared to be on a plain reading of its provisions; the bar to jurisdiction was conditional; that a Tribunal or authority neglecting to exercise its functions or acting improperly in the exercise of its function could not avoid interference by the High Court to grant relief under ARTICLE 98 (2) (a) and (b). Two other points were laid down:-

- 1) A right founded on statute can be established in courts, if the Special Tribunal or authority named in the statute for establishment of their rights does not exist; and
- 2) in the matter of elections to Legislature and other electoral bodies, no dispute arising

69). P.L.D.1965 L. 560.



in the course of an election should be entertained until the election is completed. To quote the exact words, "it is of utmost necessity that the elections are concluded as speedily as possible and all disputes which arise at intermediary stages are allowed to stand over until the election is completed". (70).

As to the elections under the National and Provincial Assemblies (Elections) act, the first important case also came for decision (71) before the West Pakistan High Court in Ahmed Saeed v. Md. Nawaz, and the Full Bench decision was duly noticed. The dispute in that case related to the nomination papers of <sup>the</sup> respondent which, in the petitioner's submission, had been accepted by the Returning Officer in violation of S.12 read with S.14 of the Act. Besides alleging that his nomination paper could not be proposed by the person, who had already proposed the petitioner, it was also maintained that the respondent had signed the nomination paper before being proposed and was invalid. The petition itself was objected to on the ground that ARTICLE 171 (1) created a bar as to its maintainability. The respondent argued that ARTICLE 171 clearly provided for disputes in connection with an election to be determined by a Tribunal constituted for that purpose and that such a dispute cannot be called in question except in accordance with such law to be passed, as ordained in the ARTICLE; that the National and Provincial Assemblies (Elections) Act had been passed in that connection and S.52 ~~there~~

70). Ibid, at p. 567.

71). P.L.D.1966 L. 88 decided on 7th May, 1965.

thereof provided that no election shall be called in question except by an election petition under S.57, which in turn laid down that "any candidate may make an election petition on grounds mentioned in S.72": It was submitted that the right to contest a dispute regarding an election is the creation of a statute and, not being an ordinary civil right or a common law right, it must be enforced within the limits of the law that created it; an election petition being the remedy provided in that law must be availed of, relief under the writ jurisdiction of the court on a matter pertaining to election dispute, where there has been no claim to relief by election petition, cannot be claimed. In other words, the main question falling for decision by the Division Bench was whether the High Court should interfere when another remedy had been provided. It respectfully followed the Full Bench decision (72) on the point of ouster of jurisdiction, but in the case before their Lordships, "not a single circumstance had been disclosed or made out to being the case within any of the exceptions noted in that judgement for invocation of a direct remedy in the writ jurisdiction in departure and in derogation of the specific remedy for the protection of the alleged breach of the petitioner's rights in the election contest". (73)

72). Dost Md. v. Returning Officer, P.L.D.1965 L.560.

73). Ahmed Saqad v. Md.Hawaz, P.L.D.1966 L.88 at p.95.

It may be mentioned that in the case under discussion it had also been argued that the law, as laid down in the Act, did not provide for any remedy for the wrong committed against the petitioner; the second respondent had been allowed to contest the election on an invalid nomination paper and this deprived him (the petitioner) of the votes, which could have otherwise polled, had the respondent been eliminated from the field. In this connection Sajjad Ahmed, J., with whom Mohammed Gul, J., agreed in entirety, made the following significant observation:

"But if, as maintained by the learned Counsel, the relevant law does not provide a remedy for the wrong, which has been allegedly done to him, it is not for this Court to create a remedy for him, as the matter has to be decided entirely on the law bearing on the subject, as envisaged by ARTICLE 171 of the Constitution: the Legislature in its wisdom may not have considered a wrong of the type as alleged by the petitioner to be one for which a remedy need be provided by way of an election petition or otherwise. There are instances in several laws where the decisions of an authority are made final, not subject to any appeal or review of higher courts and, unless it is shown that such an order by the authority concerned suffered from a defect of jurisdiction or is mala fide in character, it is not amenable to challenge even in writ jurisdiction of the Superior Courts".(74).



It may be submitted that the view that the court's jurisdiction was not exercisable, notwithstanding the absence of another appear to be harsh and, strictly speaking, a departure from the Full Bench Decision; this finds support from a later decision of the Lahore High Court in Allah Ditta v. Md. Munir (75).

ARTICLE 171 again came to be thoroughly examined by another Full Bench of the West Pakistan High Court in Nasarullah v. Member, Election Commission (76). Although the decision was reversed by the Supreme Court on the main issue, certain useful observations have been made by Mushtaq Hussain J. giving the judgement of the court. The case, heard and determined by three Judges, set aside the finding of the Division Bench (77) that, if there was no other remedy, the court had no jurisdiction; for it was said -

75). P.L.D. 1966 L. 770.

76). P.L.D. 1966 L. 850.

77). Ahmed Saled v. Md. Nawaz, P.L.D. 1966 L. 88.

78). P.L.D. 1966 L. 850 at p. 867.

79). Golsack v. Shore, (1950) 1 A.E.R. 276, where ~~Quinn~~ Evershed, M.R. said, "I accept the submission of counsel for the plaintiff that the jurisdiction of the King's Court must not be taken to be excluded unless there is clear language in the statute which is alleged to have that effect. Illustrations were given during the course of the argument of results that might arise if the Courts were fully debarred from adjudicating in respect of the transactions of this character. In such a case the party whose land was affected might be left wholly without any remedy". In Southampton Bridge Co. v. Southampton Board of Health, (1858) E&B 801 it was stated: "words should be very strong which are relied upon to take away such power".

"Having come to the conclusion that there is no other adequate remedy available to the petitioner, we now proceed to examine the other submissions made at the bar, that the provisions of ARTICLE 171 (1), of the Constitution oust the jurisdiction of the court under ARTICLE 98"(78 see previous page)

!-see previous page

The Court referred to two English decisions(79) and Maxwell on the Interpretation of Statutes (80); in the latter the following principle was laid down that -

"the case shall be heard and finally determined below would not be construed as prohibiting such interference and enactments which expressly provide that such proceedings shall not be removed by certiorari to the High Court have no application when the lower tribunal has overstepped the limits of its jurisdiction in making the order";

and concluded:-

"This is, therefore, settled law and unless express words, to oust the jurisdiction of courts and particularly Superior Courts, are used, the courts will always lean in favour of the construction that the Legislature did not intend to oust it. The makers of the Constitution were not oblivious of this canon of interpretation and when they wanted to oust the Jurisdiction of Courts, they did so in unambiguous and forceful terms as we find in ARTICLE 171 (2) and (3). There is no reason to suppose that, although they wanted to exclude the courts from exercising their constitutional jurisdiction under ARTICLE 98 in matters covered by ARTICLE 171 (1), they did not use the words necessary for such an exclusion, which have, in fact, been employed in the latter part of this very ARTICLE, in respect of matters which are

78+79). See Previous page.

80). (1962) 11th Edition p. 124.



intended to be placed within the reach of the courts. When the makers of the Constitution have used different expressions in different parts of the same ARTICLE, the only inference that can be drawn is that different results were sought to be achieved"(81).

To illustrate the point their Lordships were making, reference was made to ARTICLE 116 of the Constitution, which is meant to protect the President and the Governors against action in a court of law and ARTICLE 117, which extended this privilege to Ministers also; both ARTICLES were so worded as to expressly oust the jurisdiction of courts to a particular extent; the words were unlike those used in ARTICLE 171 (1). In the further opinion of their Lordships, as S.52 of the National and Provincial Assemblies (Elections) Act purported to exclude the jurisdiction of the courts in the words of ARTICLE 171 (2) and (3), it impinged upon the jurisdiction of the High Courts under ARTICLE 98 and, to that extent, was ultra vires the Legislature. The Court held that the determination of disputes, covered by ARTICLE 171 (1) were not exempt from judicial review under ARTICLE 98. This view, in the judgement of the court, was acceptable whether "looked at from the point of view of certiorari jurisdiction of the English courts of the jurisdiction exercised by this court under ARTICLE 98 of the Constitution".(82).

81). 1966 L. 850 at pp.868,869.

82). P.L.D.1966 L850 at p.874. But, as pointed out earlier, a more critical examination of ARTICLE 171 and ARTICLE 98 would appear to suggest that there is a bar to jurisdiction.

However, when the matter went to the Supreme Court, their Lordships approached it differently and held that jurisdiction was exercisable in exceptional cases (83). It may be observed that the words "without lawful authority", occurring in ARTICLE 98 (2) (a) (ii) were also considered by the Full Bench and the decision is in accordance with views stated earlier, than an erroneous interpretation or conclusion on a point of law by an inferior tribunal or court, with which the High Court may subsequently not be in agreement, does not render that decision "without lawful authority" and amenable to the High Courts' jurisdiction under ARTICLE 98. According to the Full Bench of the High Court, the Member of the Election Commission, whose decision was impugned, had acted without lawful authority as, in refusing to go into certain questions, he had refused to exercise jurisdiction; the Supreme Court did not agree with this finding, because the learned Member had rightly left those questions for determination by the Tribunal. It is now proposed to deal with the celebrated decision of the Supreme Court in Jamal Shah v. Member, Election Commission (84), where the main question falling for consideration in appeal, by special leave, was the scope of ARTICLE 98 of the Constitution in relation to jurisdiction in election disputes, for which provision was made

83). Jamal Shah v. Member, Election Commission: P.L.D.1966 S.C.1.; this case will be shortly discussed.

84). P.L.D. 1966. S.C.1, decided on 8th October 1965.

by ARTICLE 171 of the Constitution and the laws made in compliance therewith, namely the National and Provincial Assemblies (Elections) Act 1964 and the statutory rules thereunder.

For The appellant it was argued that matters arising out of election disputes relating to the major Assemblies in Pakistan are excluded from judicial preview by their very nature and effect was expressly given this restriction, by the wording of ARTICLE 171 of the Constitution and the relevant laws thereunder; such disputes whether they related to the scrutiny of votes or involved larger questions, such as corrupt or illegal practices, are required by the Constitution, to be "finally determined" by the authorities specified in ARTICLE 171 and by S.112 of the Act of 1964; and the legality of anything done by any such authority is not open to question in any court of law.

The respondent replied that election matters were not foreign to the jurisdiction of the High Court; in the United Kingdom, Parliamentary election disputes are heard and decided by a Bench of two Judges of the High Court, from whose decision by special leave, an appeal lies on points of law to the Court of Appeal; in India an appeal is allowed by law from a decision of an Election Tribunal to the High Court (85);

85). The Indian Constitution has been amended and the election petition will in future be heard, as in England, by two Judges of the High Court.

an error of law appearing on the face of the record attracts the jurisdiction of the Queen's Bench Division in England in certiorari (86), and High Courts under ARTICLE 98 had issued writs in election cases (87).

At the very outset the Court made it abundantly clear that ARTICLE 98 of the Constitution, under which the High Court had purported to exercise jurisdiction, was a new provision, conferred by the Constitution of 1962 and had to be interpreted with reference to ARTICLE 171, which also appeared in the same Constitution; reference to the decisions of the King's Bench and Queen's Bench in certiorari was not appropriate. Cornelius, C.J., said,

"With respect to the view of the Full Bench, for which justification may perhaps be found from expressions in great many judgements delivered by the courts in England, where jurisdiction comparable to and yet significantly different from that which is now exercised in Pakistan under ARTICLE 98 was derived from the ancient perogatives of the King, it must be observed that any assumption that power under ARTICLE 98 is something inherent in the High Court, something of earlier origin than the Constitution of 1962, is one that cannot be supported. The power given by ARTICLE 98 comes as a matter of first conferment by the Constitution and it cannot be placed on any higher footing than the authority which can be claimed for ARTICLE 171 in the same Constitution(88)".

- 86). Reference was made to the Northumberland Compensation Appeal Tribunal: (1952) 1 A.E.R.122.
- 87). In particular reference was made to Badarul Haq v. Election Tribunal: P.L.D. 1963 S.C.704.
- 88). P.L.D.1966 S.C.1. at p.25.

In other words, it was pointed out that whereas ARTICLE 171 (1) was expressly "subject to the Constitution", ARTICLE 98 confers powers on the High Court "subject to the Constitution", so that the terms of ARTICLE 171 (1) must be construed and given their fullest meaning, irrespective of anything contained in any other ARTICLE of the Constitution. Proceeding on that basis, Cornelius C.J., remarked,

"it is plain that ARTICLE 171 requires, with respect to election disputes that their determination should be in accordance with the law specially made for that purpose and not determination only, but final determination, that is to say determination once for all. To emphasize and place beyond doubt that the jurisdiction thus being created was exclusive in an absolute sense, words were added to ARTICLE 171 which produce the effect that no dispute arising out of an election shall be decided otherwise than under the law specifically made for the purpose in accordance with the subsection, nor shall the validity of such an election be called in question, except in accordance with the provisions of the aforesaid law, in this case the National and Provincial Assemblies (Elections) Act, 1964". (89).

Cornelius, C.J., was of the view that the authorities and tribunals, constituted under ARTICLE 171, exercise jurisdiction which does not and never did belong to the High Court, but was an essential part of the Parliamentary Jurisdiction that had been by law entrusted to specified authorities to operate.

89). Ibid., at P.26.

This statement was made by his Lordship after tracing the history of election disputes in the Indo-Pakistan subcontinent and in England. It is not the purpose of this thesis to trace the entire history; so the position, as summed up by the learned Chief Justice, may be advantageously reproduced. His Lordship said,

"In the history of the subcontinent and since 1947 of Pakistan, with the exception of a short period between 1956 and 1958 when the judgement in Mohammed Saeed's Case (90) was delivered by the Supreme Court reversing the decision of an Election Tribunal, the position has throughout been that the election disputes had been totally excluded from the jurisdiction of the High Courts. The whole law relating to the conduct of elections and in particular to balloting, i.e., discrimination between valid and invalid votes, as well as in relation to corrupt practices and other illegalities, such as could vitiate an election or entail the loss of franchise by individuals, has remained throughout sealed qua the jurisdiction of the High Court. The judgement under appeal is probably the first judgement in which a High Court has purported to declare with respect to

- 90). P.L.D.1957 S.C.91. It was held that where a special Tribunal, like the Election Petitions Tribunal, has functioned within the spirit and the intention of the Statute that created it and while so functioning has made a real and honest endeavour to judge facts on the merits of the evidence and apply the law to them, a finding of fact thus arrived at, however erroneous, will not be scrutinized or reviewed by the Courts and even if an error of law be committed, that will not be a sufficient ground for interference unless the law so misunderstood or misapplied raises some general question of fundamental importance to the proper functioning of the Tribunal or the decision of the case. But if the Tribunal has made no honest effort to arrive at a correct conclusion or has come to a decision which no reasonable body could have come to or has on evidence recorded findings which have deprived persons of important constitutional rights, the exercise of which is the very basis on which the whole constitutional fabric rests, this court will be acting in betrayal of the Constitution if on such case being made out, it ~~does~~ not interfere with the verdict of the Tribunal.

a ballot paper whether or not it should have been rejected on a true construction of the law relating thereto. Nowhere in the whole range of reports is any case to be found either deciding or laying down principles for decision as to what types of action should or should not be considered to be the corrupt practice of bribery or of undue influence or of personation, or of false statements: these being the main corrupt practices, or even as to illegalities and irregularities of a more technical nature. The incidents of bribery, that is to say, the elements of the offence, the variety of circumstances in which it can be held to have been practised and the estimation of intentions are matters very well within the High Courts, through the exercise of their criminal and general jurisdiction. Undue influence in a general sense is a topic arising out of human transactions in infinite variety for the consideration of the High Court in its various jurisdictions. Personation again is a defined offence in the Penal Code and with its incidents the High Court may be deemed to be as familiar as it was with 'false statement' in the general sense. As to the ascertainment of illegality in respect of actions and practices, there can be no question but that by the wide experience gained through the exercise of its ordinary jurisdiction, the High Court is very well equipped to judge. Yet the position is undoubted that with respect to all these matters, there is not a single case to be found where the law has been laid down and a finding recorded by the High Court in a case of an election dispute, where the subject matter was as to whether or not the election of the returned candidate was valid or that a disqualification or penalty provided exclusively by the election law had been incorrectly applied. The solitary exception is the case of Mohammed Saeed (91), where the Supreme Court did review the evidence received by the Election Tribunal in exercise of the power derived from ARTICLE 160 of the short-lived Constitution of 1956 and in consequence reversed the decision

of the Election Tribunal on a point relating to the exercise, inter alia, of undue influence. It has been indicated already how that brief interlude came to an end in 1962 (still during the Martial Law period) when with respect to elections to the Assemblies the intervention of the High Court as a deciding authority on law or fact was wholly excluded. That condition was given constitutional validity by Article 171 of 1962." (92).

The Chief Justice then traced the development of election disputes in England. In the period before the 17th Century the King settled such disputes without question, until, under Richard II there was a protest. But it was not until 1625, in the reign of James I, that the House of Commons assumed jurisdiction, after obtaining the opinion of the Judges. At first such disputes were decided by the whole House, which led to the general complaint that the minority party could not get justice and the composition of the House was a matter decided by the majority party. In 1770, the House abandoned its privilege to try election petitions and referred them to committees of the House for adjudication (93); this was also unsatisfactory as the members of the Committee were members of the majority party. In 1868 a move was made to refer election disputes to Special Tribunals and a Select Committee suggested that election cases be referred to the

92) Janal Shah v. H.E.C., P.L.D. 1966 S.C.1 at pp. 29, 30.

93) Granville Act, 1770.



Queen's Bench Division(94), whereupon the Judges protested expressing their "insuperable repugnance" to being charged with this responsibility, on the ground that their conclusions would become subject of public debate. They also pleaded overwork and the right not to have such duties imposed on them by what they described as an "objectionable measure".

In 1879, a rota system was devised, that is, a panel of Judges of the Queen's Bench Division was formed and it was provided that each election dispute should be referred to two Judges taken from that panel (95). This system is now operated under the Representation of the People Act, 1949 (96), which requires the Judges to follow the principles and procedure of the earlier parliamentary committees, <sup>is</sup> that, the election law as laid down by the Committees from the year 1770 onwards, including the principles and rules with regard to agency and evidence and to a scrutiny. Parliamentary presence at the trial is secured by the provision that the shorthand writer of the House of Commons should attend and take notes; where there is a difference of opinion between two Judges as to whether a returned candidate was duly elected or whether an election <sup>should</sup> stand, if they agree that the respondent was not duly elected but differ only on other matters, the election is void (97).

94). Parliamentary Elections Act, 1868, S.11 and 50, the House transferred its jurisdiction to one Judge on the rota for the trial of election petitions.

95). Parliamentary Elections(Corrupt Practices)Act,1879, S.2.

96). S.110.

97). Representation of the People Act, 1949, S.124.

There is no provision for reference to a third Judge in such cases. An appeal on a point of law, by special leave of the High Court, is heard by the Court of Appeal whose decision is "final and conclusive"(98).

Commenting on the nature of the jurisdiction exercisable by the High Court in England in election disputes, Chief Justice Cornelius said,

"All authorities agree that this jurisdiction is really a part of the Parliamentary jurisdiction, the High Court being used as a body to which determination of disputed elections and of all questions arising therein has been entrusted. There would appear to have resulted from this development of the law in England, a transfer of an extremely important power of the Sovereign Legislature, namely power of determining its own composition, from the Legislature itself to the High Court, so that in a sense, in the limited field of election disputes, it is the High Court which is the final determining authority and not Parliament as before. Such a condition under a system which provides for mutually exclusive status and powers to be possessed and exercised by three great organs of the State, namely, the Executives, the Legislature and the Judiciary, may be thought to create an anomaly from which great disputes and difficulties could arise, such as might shake the very foundations of the State. In a country with a very long tradition of Parliamentary Government as well as of judicial nicety and restraint, the system may well be operated without injurious consequences, despite the anomaly, but instances are not lacking in countries, where the general pattern of the British Constitution has been recently adopted, where the question is under serious and active discussion whether the Sovereignty of the Legislature within its own field is not being eroded by actions

98). Ibid., S.137 (1).

of the Judiciary under assumption of powers in certain important respects. The condition is not infrequently found where, following an election, the parties are so evenly balanced that the ascertainment of the majority might turn on the result of a few election petitions. In such a case, the question may well arise whether in fact it will not have been entrusted to the Judges, should election disputes be made matter for judicial decision, what should be the composition of the House, entailing such a question of transcendent importance as which shall be the majority party to rule the country" (99).

And in particular reference to Pakistan his Lordship observed: -

"where Parliamentary and Judicial functions are not indigenous nor of any long standing but where the Constitution expressly provides for differentiation of functions between the three great organs of the State, it is a major consideration of great weight that its provisions should not be interpreted in a manner which enables one of these organs to interfere directly with the matters which the Constitution has exclusively placed within the authority of the organ for final determination. In direct contrast to the provision now obtaining in England that election disputes are referred to the High Court for determination, under the special provisions referred to above, in our Constitution ARTICLE 171 requires that such disputes should go before specified authorities and Tribunal for "final determination". These authorities and Tribunals exercise in the relevant respect jurisdiction which does not and never did belong to the High Court, but is an essential part of Parliamentary jurisdiction that has been by law entrusted to specified authorities to operate (1).

Thus, according to Cornelius, C.J., the entire law of elections is of a special character and the election jurisdiction should be treated as being outside the range of regulation through processes known to established courts, such as the High Court;

(99). P.L.D.1966 S.C.1 at p.31.

(1). P.L.D.1966 S.C.1 at p.32.

the authority or tribunal appointed under ARTICLE 171, to finally determine election disputes, acts not as a member of the Judiciary but is an agency to exercise a jurisdiction essentially belonging to the Legislature; its decision is final and not amenable to the general power of correction given to the High Court under ARTICLE 98 of the Constitution. Although the other four Judges were generally in agreement with what the Chief Justice said(2) in respect of election disputes and their special character, they were of the view that a High Court could and should exercise its powers under ARTICLE 98 of the Constitution, that is, within the limited scope of the power granted by that ARTICLE, "if....the authority or tribunal, appointed under the Act, has either failed to exercise jurisdiction vested in it or clearly exceeded that jurisdiction or if the order in question is found to be tainted with mala fides'(3); it was held that in such a case the order would not fall within the four corners of the exclusive law. In other words, election matters, only insofar as they raise questions

- 2). S.A. Rahman, J., the senior puisne Judge, and Fazl-e-Akbar, J., have appended short notes of their own laying down the ratio in the case; Kaikaus, J., has dissented from the learned Chief Justice on many points of law and defined acts which are "without lawful authority" within the meaning of ART. 98 so that he is in favour of interference; Yaqub Ali, J., followed a somewhat similar pattern as the judgement of Cornelius, C.J., but he was also in favour of indulgence of Superior Courts in special cases.
- 3). See Next page.

of jurisdiction, amenable to the writ jurisdiction of the High Courts under ARTICLE 98.

It is important to examine very briefly cases decided after the judgement in Jamal Shah's Case(4) was delivered by the Supreme Court, to establish what effect has been given to the rule enunciated by the highest court of the country, whether the courts have interpreted it correctly or deviated from that pronouncement. Two cases decided by the West Pakistan High Court, Bugra v. Md. Yusuf(5) and Abdul Shakoor v. Abdul Latif(6) do not refer to the decision in Jamal Shah's Case(7); the reason appears to be that the arguments were probably concluded and the decisions arrived at before the Supreme Court judgement was published, otherwise a reference should have been unavoidable. In the case of Bugra v. Md. Yusuf(8), the Lahore High Court relied

- 3). P.L.D.1966 S.C.1 at p.44, per S.A.Rehman, J.; Fazale Akbar and Kaikaus, JJ., agreed with him. According to Yaqub Ali, J., jurisdiction could be exercised if the authority refuses to exercise jurisdiction conferred on it by the Act or Acts in clear violation of its mandatory provisions. The judgement can be construed as laying down that an erroneous decision on the point of law could be corrected by a writ.
- 4). P.L.D.1966 S.C.1. The latest position is expressed by a full Bench of the Lahore High Court in Arif Iftikhar v. Election Tribunal. Sajjad Ahmed, J., said, "the High court has the power to put back the tribunals on the constitutional and legal rails where they are found to have committed a patent illegality which is destructive of their jurisdiction" (P.L.D. 1968 L.1387 at p.1392).
- 5). P.L.D.1966 L.149, decided on 25.10.65.
- 6). P.L.D.1966 L.187, decided on 22.11.65.
- 7). P.L.D.1966 S.C.1.
- 8). P.L.D.1966 L.149.

on its own full Bench decision in Dost Md. v. Returning Officer (9) and declined to interfere with the nomination of the respondent, which was alleged by the petitioner to be invalid, because he (the respondent) was below the stipulated age of 25 years. Jurisdiction was, however, exercised in the latter case (10) for the Tribunal, which tried the petition under the Electoral College Act, had not provided the petitioner (respondent in the election petition) opportunity to disprove the allegations in the election petition, thereby acting in direct "contravention" of the mandatory provisions of S.60(2) of the Act, amounting to a colourable exercise of jurisdiction". So the position was far from being certain and one wonders whether the decision in Jamal Shah's Case (11), being decided under the provisions of the National and Provincial Assemblies (Elections) Act, was not relevant in cases arising out of elections held under the Electoral College Act. In January 1966 the West Pakistan High Court, consisting of Sajjad Ahmed and Md. Gul JJ., gave ~~indignant~~ judgement in Abdur Rashid v. Mahmud Sadiq (12). In that case the Election Tribunal set aside the petitioner's election on the ground that he was under 25 years of age on

9). P.L.D. 1965 L. 560.

10). Abdul Bhakoor v. Abdul Latif, P.L.D. 1966 L. 187.

11). P.L.D. 1966 S.C.1.

12). P.L.D. 1966 L. 216, decided on 10.1.66.

the nomination day; in doing so it went behind the entry as to the petitioner's age in the electoral roll, which he was not permitted to do by virtue of S.14(4) read with S.23(1) of the Act. The Court held that, although the decision of the Tribunal was erroneous, as it was necessary for it to come to its own finding on the appraisal of the data before it, it could not be disturbed in the exercise of jurisdiction conferred by ARTI\* CLE 98, in view of the Supreme Court's decision in Jamal Shah's Case(13). This was the first decision following the Supreme Court view. It was followed by the decision of the Peshawar High Court in the case reported as Sher Md. v. Deputy Commissioner and Election Tribunal(14). In the last mentioned case, the order of the Tribunal was challenged on the ~~gm~~ grounds that it had erred in holding that the petitioner did not comply with the conditions set out in S.36; it committed an error of law in declaring the election void on a technical irregularity; it acted without jurisdiction in setting aside the election, when there was no finding that the result of the election had been materially affected. The Court, respectfully following the Supreme Court, declined to interfere, because the grounds did not bring it within the exceptions expressed by their Lordships in Jamal Shah v. Member, Election Commission(15). It is submitted that the

13). P.L.D.1966 S.C.1.

14). P.L.D.1966 P.154, decided on 8.2.66.

15). P.L.D.1966 S.C.1.

decision is strictly in consonance with the Supreme Court decision and is, therefore, correct.

While the High Courts were gradually accepting the rule enunciated by the Supreme Court in Jamal Shah v. Member Election Commission (16), another decision was handed down by their Lordships of the Supreme Court in Akbar Ali v. ~~Raz~~ Raziurrehman (17). The decision is important in two respects. Firstly, it purported to modify and explain the earlier view and secondly it provided a pronouncement by the Supreme Court in a case under the Electoral College Act. It is necessary to mention the facts of the case to facilitate understanding of the view expressed by the learned Judges, by which the High Courts would be bound in future.

The appellant had secured 326 votes as against 330 polled by the respondent. However, in the count, 6 ballot papers of the appellant were declared invalid under S.45. reducing his total to 320; similarly the Presiding Officer excluded 12 ballot papers of the respondent, whose total number of valid votes fell to 318; out of the 12 excluded ballot papers of the respondent, one ballot paper bore neither the official mark or initial of the Presiding Officer (16). Ibid.

17). P.L.D. 1966 S.C.492, decided on 10.2.66.



five had only the initials and the remaining six were treated as spoilt within the meaning of S.43 of the Act. The Tribunal held that both initials and official marks were necessary, in its interpretation of the provisions of S.40(2) (c) and S.45 (1)(a); in consequence the election of the appellant was maintained. The High Court found that the six ballot papers, described as spoilt ballot papers, had been wrongly rejected on grounds which were "entirely imaginary"; in other words, the proper procedure prescribed by S.43 of the Act and r.33 of the Rules had not been adopted; it was observed that "when, on the preliminary count, it was found that the petitioner (respondent before the Supreme Court) had secured a majority of votes polled, respondent no.3 (Election Tribunal) in his wantonness cancelled six ballot papers to ensure<sup>a</sup> majority for respondent no.1 (appellant before the Supreme Court); as held in Jamal Shah's Case (18) the ballot paper, which bore neither the official mark nor the initials, could only be rejected; the writ petition was accepted and the election authorities directed to declare the respondent duly elected to the Electoral College.

Before the Supreme Court it was argued that the order of the Tribunal was clothed with finality, as it was within its lawful authority to interpret the provision of law one 18). P.L.D. 1966 S.C.1.

way or the other; this had been so held by the Supreme Court in respect of the order of Member of the Election Commission in Jamal Shah v. Member Election Commission (19). But the Supreme Court declined to hold that the decision of the Tribunal was final because,

"In the first place it would appear that the Presiding Officer had acted wantonly in cancelling the ballot papers of the respondent, which were free from any defect to attract the application of S.43 of the Act. The reasoning that the ballot paper had been cancelled before they were cast was not only a convenient surmise but fully belied by intrinsic evidence found that, if they had been cancelled, they would have been returned to the Presiding Officer and not allowed to remain in the custody of the voters".(20)

The Court held,

"If an election authority or tribunal acts in this fashion whether under the National and Provincial Assemblies (Elections) Act or the Electoral College Act, the decision in Jamal Shah's Case would not be an authority for the view that their decisions are sacrosanct and may be called in question in the High Court". (21).

It will be observed that the Supreme Court had, prima facie, modified its earlier view. What the Election Tribunal had done, in the case under discussion, was to misinterpret the provisions of the Act and the Rules, which, as observed in

19). ~~Idem~~ P.L.D. 1966 S.C.1.

20). P.L.D.1966 S.C.492 at p.496, Per Yaqub Ali, J., delivering the judgement of the Court.

21). P.L.D. 1966 S.C.492 at p. 496.

Jamal Shah's Case (22) did not render its decision without lawful authority; for the latter expression was confined to errors of jurisdiction and failure to exercise jurisdiction vested by the law. It may also be mentioned that in Akbar Ali's Case (23), the Supreme Court itself proceeded to lay down the true interpretation of SS.40 and 45 and in that view held that the decision taken by the High Court was correct.

It is interesting to refer to two decisions of the West Pakistan High Court in Dil Md. v. Election Tribunal (24) and Md. Ibrahim v. Election Tribunal (25), in which the rule in Jamal Shah's Case (26) fell for interpretation before S.A.Mahmood and Khattak, JJ. The court exercised jurisdiction on the ground that the dispute in both cases related to the count of votes and as the Electoral College Act did not make provisions therefor, in compliance with ARTICLE 171 of the Constitution - as is the case under the National and Provincial Assemblies (Elections) Act - the bar to jurisdiction would not apply. It is submitted that the reasoning advanced by S.A.Mahmood, J. is acceptable upon an interpretation of ARTICLE 171 (1), which has already been stated. (27)

22). P.L.D.1966 S.C., as would appear from the judgements of S.A.Rahman, Fazle Akbar and Kaikaus JJ., the instant decision is more in conformity with the view expressed by Yaqub Ali, J.

23). P.L.D.1966 S.C.492.

24). P.L.D.1966 L.669 decided on 1.3.66.

25). P.L.D.1966 L794 decided on 1.3.66.

26). P.L.D.1966 S.C.1.

27). supra.

In the second of the aforementioned cases (28) the High Court also decided to interfere on the ground that the Election Tribunal had reached its decision "in contravention of the provisions of S.45 of the Electoral College Act". Although Akbar Ali's Case (29) is not referred to, it would seem that the High Court's decision is in accordance therewith. So, it is wrong to suppose that the decision in Jamal Shah's Case (30) is confined to cases under the Assemblies (Elections) Act (31), although the rule laid down in that case may not be applicable in cases relating to the count of votes at an Electoral College Election (32).

After the Supreme Court decision in Akbar Ali's Case (33) it may be possible to attack the decision of an election authority on the ground that it is based on an erroneous interpretation of the law. But one wonders if this is what the Supreme Court, in fact, purported to lay down. In other words, it is doubtful whether every wrong decision on the point of law by an inferior tribunal would attract the High Court's jurisdiction; for when an authority has jurisdiction to decide a particular matter, it has the jurisdiction to decide rightly or wrongly. So, we must interpret the decision

28). namely, Md.Ibrahim v. Election Tribunal, P.L.D.1966 L794.  
 29). P.L.D.1966 S.C.492.  
 30). P.L.D.1966 S.C. 1.  
 31). As would appear from the decision in Ghulam Ali v.Shafqat, P.L.D.1966 L.1028.  
 32). Ibid.,and Dil Md.v. Election Tribunal, P.L.D.1966 L669; Md. Ibrahim v. Election Tribunal, P.L.D.1966 L.794.  
 33). P.L.D. 1965 S.C.492.

in Akbar Ali's Case (34) in a manner compatible with the dictum of the Supreme Court in Jamal Shah's Case(35). In that view, it is submitted that the High Courts should only exercise jurisdiction under ARTICLE 98, if the misinterpretation of a provision of the Act or the Rules goes to the root of the Tribunal's jurisdiction. In this context, it is useful to refer to the following observation of Mushtaq Hussain, J., -

"The mere fact, therefore, that on a point of law a court comes to a conclusion with which the High Court is not in agreement will not entitle the latter to interfere in the exercise of the revisional jurisdiction to decide it; it follows that it has the jurisdiction to decide rightly or wrongly. But this is not the end of the matter and if such a wrong interpretation placed upon law by a lower court results in the refusal of that court to exercise jurisdiction vested in it by law, the High Court has the power to interfere and not only correct the decision of the lower court on the point of law but to direct it to proceed with the disposal of the case in accordance with such decision". (36).

In other words it is possible that an erroneous decision may result in the subordinate authority exercising a jurisdiction not vested in it by law or failing to exercise jurisdiction so vested. This has been held by the Privy Council in Joy Chand v. Karma Laska (37). Although that case pertained to the

34). Ibid.

35). P.L.D.1966 S.C.1.

36). Nqsarullah v. Member, Election Commission, P.L.D.1966 L.850 at p. 875.

37). A.I.R. 1949 P.C. 239.

revisional jurisdiction of the High Court, under S.115 Civil Procedure Code, it is submitted that the position under ARTICLE 98 would be the same.

The upshot of the whole discussion is that courts in Pakistan should not hesitate to exercise jurisdiction under ARTICLE 98 of the Constitution, provided the case falls within its provisions and the grounds argued raise a question as to the jurisdiction of the Tribunal, which decided the election petition. Apart from this, there are other reasons why jurisdiction of the Superior Courts should not be completely taken away. Election Tribunals are appointed by the Government and it is doubtful whether candidates would repose the same confidence and faith in their decisions, as in a decision by the higher Judiciary. It is submitted that, unless a provision is made in law for an election petition to be decided by the High Court, as in England (38), ~~whereas~~ the High Courts must continue to exercise jurisdiction (39). No judicial qualifications are prescribed for members of election tribunals constituted under the Electoral College Act. Finally the decisions of the election authorities are not published, so

- 38). By the recent Constitutional Amendment, the Election Tribunals have been abolished and the position in India is similar to England.
- 39). It is true that the Tribunal under the Assemblies (Election) Act is to consist of past or present Judges of the Court but that is something different. In any case, the position in relation to petitions under the Electoral College Act is far from satisfactory.

that the corpus juris in relation to elections can only develop if the High Courts and the Supreme Court hand down decisions, which would bind the election authorities in their administrative and judicial functions.

Chapter 10CONCLUSION

The indirect system of elections, envisaged by the Constitution of the Islamic Republic of Pakistan, though not opposed to Islamic principles, is open to the criticism that the President and the members of the Legislatures, who are elected by an electoral college, are not the true representatives of the people. In view of the manifest dissatisfaction in the country it is desirable that elections there should be direct. In the alternative, the members of the Assemblies should be elected by universal adult franchise and the President by the present Electoral College which now comprises 120,000 members.

ARTICLE 173 of the Constitution discourages the formation of political parties. The law enacted in pursuance thereof, namely the Political Parties Act of 1962, aims at restricting the freedom of political parties and is an unsatisfactory piece of legislation. The absence of a strong opposition party is not a healthy sign and is a practice to be deprecated, for it results in a bad government



not representative of the people and in which the people have very little confidence. The provision in ARTICLE 173 for holding "projection meetings", where candidates for membership of the Assemblies and office of the President (but not the Electoral College) are supposed to meet their electors face to face and explain their policies to them, is hardly a substitute.

The provisions of law dealing with delimitation are adequate but an effort should be made to avoid gerrymandering and ensure representation of the minorities. There should be provision for re-delimitation and the National Assembly should be given a greater say in the matter. The Amendment Act 17 of 1967, whereby the Chief Election Commissioner has been empowered to call for and examine the record relating to delimitation at any time and to order its modification or correction, is an amendment to be commended; so also is the new provision concerning the appointment of Assistant Delimitation Officers, who are to work under and are answerable to the Delimitation Officer.

The law with regard to the qualifications and disqualifications of voters is satisfactory as it embodies

the general principles enunciated by similar statutes in the Commonwealth. However, provision should be made for "absentee voters". The result of the election can be materially affected by the absence of voters, who, for some reason or the other, may be unable to reach the polling station. A scheme could be worked out, on the lines adopted in other countries, so that voters who think they would be unable to attend the poll, for example on account of a long term posting abroad, should give advance notice of their inability. A separate electoral list should be made of such persons.

The provision with regard to double enrolment should be clarified and, if necessary, amended accordingly. Wide publicity should be given to the preparation of the draft electoral rolls in the press and radio; enquiries regarding particulars should be conducted by the Provincial Election Authorities. If properly carried out, this could avoid a lot of election disputes arising out of careless preparation of electoral rolls. The staff should be apprised of the importance and binding nature of the entries in the electoral roll and the position emerging from the

latest decisions of the High Courts and Supreme Court.

The omission, to disqualify people holding contracts with the government or a local authority from the membership of Legislatures, is a serious one. This has all along been a disqualification and should be incorporated in the National and Provincial Assemblies (Elections) Act. It is significant to observe that such a disqualification is contemplated by the Electoral College Act. Wives of the President, the Governors and Ministers should, as in the case of other government servants, be disqualified from contesting elections. There is no appeal provided against acceptance of a nomination, so in such case the Returning Officer should be empowered to review his orders.

Elaborate provisions are made for the conduct of elections to the Assemblies. The Electoral College Act should be brought in line with the National and Provincial Assemblies (Elections) Act. The system of a single ballot box should be introduced for an election to the Electoral College. The use of a separate ballot box for each candidate is not very conducive to a fair and impartial election. Significantly enough the Pakistan Constitution and the electoral laws make adequate provisions for the secrecy of

the ballot, which is the essence of a free voting system.

The election of the President is indirect and is open to the same criticism as the elections to the Assemblies. The Presidential Election Act read with the Constitution makes the necessary provisions for conducting such an election. The election of the President should be open to challenge by a tribunal, such as five Judges of the Superior Courts, three from the Supreme Court and one each from the Provincial High Courts, to be nominated by the Chief Justice of Pakistan.

To ensure a free and impartial election every kind of misconduct should be avoided at the polls. For this the law enacted in pursuance of ARTICLE 172 of the Constitution makes provision and defines the various election offences. They are the same in both Acts but they should also be included in the Presidential Election Act, as a deterrent to the candidates for the presidency.

The provision regarding ~~the~~ election disputes is contained in ARTICLE 171(1) of the Constitution. The Electoral College Act and the National and Provincial Assemblies (Elections) Act are enacted to give effect to this

constitutional provision. A dispute as to the count of votes arising from an election to one of the Assemblies is heard by a Member of the Election Commission. For other disputes, the forum is the Election Tribunal, which consists of members with a sound judicial experience or background. A proper enquiry is contemplated by the National and Provincial Assemblies (Elections) Act.

For elections to the Electoral College, all disputes are to be heard and determined by the Election Tribunal, for the members of which no qualifications are prescribed but in practice officers of the Government are entrusted with the disposal of election petitions. The law itself is not very clear about the nature of the enquiry to be conducted by the tribunal. The first election tribunals disposed of petitions too quickly, without regard to the principles of natural justice or judicial procedure but the position has been changed by the decisions of the High Court, which remanded ~~xxxx~~ to the Election Tribunal cases in which these principles had been ignored. But the position could be further improved—many decisions of the Election Tribunal are set aside by the High Court—if the enquiry was entrusted to permanent election tribunals, constituted from among

members of the bar, whether with or without experience in election cases. It has been contended that the Electoral College Act should also provide for disputes as to the count to be determined by the Election Commission or a Member, as required by the Constitution. The Constitution could be amended to remove ~~this~~ lacuna. All disputes should, however, continue to be decided by the Election Tribunal.

India has followed England in the matter of the trial of election petitions and in future they will be heard by a division Bench of a High Court. If a similar system is introduced in Pakistan, the vexed question, whether the High Court should interfere in election matters, would be settled. An appeal, by special leave, could then be taken to the Supreme Court. However, the High Courts and the Supreme Court have assumed jurisdiction in cases where the Election Tribunal, the Member of the Election Commission, or other functionary acting in an administrative or quasi judicial capacity acts without jurisdiction, or in excess or abuse of jurisdiction or fails to exercise jurisdiction.

The success of an election depends upon those who conduct it. The independence of the Election Commission and

the Chief Election Commissioner(for elections to the Assemblies and Electoral College respectively)should be ensured.The observation on this point made in earlier chapters of the thesis may be regarded as reccomendations. Election Commissions elsewhere are given legal protection in dicharge of their official functions.No such protection has been provided by the Constitution of Pakistan.The Commission and the members of the Commission should have power to punish for contempt.

Finally,the Electoral College Act is not a good piece of legislation.The various lacunae in this Act have been pointed out earlier in the thesis.The Act should be brought into conformity with the National and Provinvial Assemblies (Elections)Act.

In short,the law of elections in Pakistan is excellent in parts but there is room for further improvement.

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ABBREVIATIONS

## A

A.B.A.J.	=	American Bar Association Journal.
A.C.	=	Appeal Cases.
A.I.R.	=	All India Reporter.
A.E.R.	=	All England Reports.
Ad. & E.	=	Adolphus and Ellis (Queen's Bench) Reports.
Allah.	=	Allahbad High Court.
All.E.R.	=	All England Reports.
Art.	=	an article of the Order for a Constitution.
ART.	≠	an Article of the Pakistan Constitution of 1962.
Ass.	=	Assemblies.
Assm.	=	Assemblies.

## B

B.	=	Bombay High Court.
B.J.	=	Baghdad-ul-Jadid Circuit of the West Pakistan High Court.

## C

C.B.(N.S.)	=	Common Bench (New Series).
C.P.	=	Common Pleas.
C.P.D.	=	Common Pleas Division.
Ch.	=	Chancery Division (after 1890).
Ch.D.	=	Chancery Division (1875-1890).

## D

D.	≠	Dacca High Court, East Pakistan.
D.E.C.	=	Doabia's Election Cases (1864-1935).
D.I.E.C.	=	Doabia's <sup>Indian</sup> Election Cases (1935-50).



## E

E.C.	=	Election Commission, Pakistan: decision of the Member, Election Commission. <u>See</u> J.
E.L.R.	=	Election Law Reports (India).
E.T.	=	Election Tribunal's decision. <u>See</u> J.
E. & B.	=	Ellis and Blackburn (Queen Bench) Reports.

## F

F.C.	=	Federal Court, decision of.
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## H

H.E.C.	=	Hammond's Election Cases (1920-35).
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## I

Inst.	=	Coke's Institutes of the Laws of England.
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## J

J.	=	Journal Section of the Pakistan Legal Decisions containing articles, decisions of the Member, Election Commission and Election Tribunal's under the Assemblies (Elections) Act.
Journ.	=	Ibid.

## K

K.	=	High Court of West Pakistan at Karachi.
K.B.	=	King's Bench.
K.B.	=	King's Bench Division (before 1891).
K.E.C.	=	Khanna's Election Cases (India).

## L

L.	=	Lahore High Court:High Court of West Pakistan,Lahore.
L.R.C.P.	=	Law Reports(Common Pleas),1865 to 1875.
L.T.	#	Law Times Reports(1859-1947).
Lah.	=	Lahore High Court <u>or</u> High Court of West Pakistan at Lahore.

## M

M.E.C.	#	Member,Election Commission.
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## N

N.P.A.	=	National and Provincial Assemblies.
Nat.& Prov. Ass.	=	National and Provincial Assemblies.
N.&P.A.(E) Act/Rules	=	National and Provincial Assemblies (Elections)Act/Rules,1964.
N.&P.(F.E.) Order	=	National and Provincial Assemblies (First Elections)Order,1962.
Nat.& Prov. Assem.(E) Act/Rules	=	National and Provincial Assemblies (Elections)Act/Rules,1964.

## O

O'M.&H.		O'Malley and Hardcastle's Reports of Election Petitions in England.
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## P

P.	=	Peshawar High Court:High Court of West Pakistan at Peshwar.
p.	=	page.
pp.	=	pages.



P.C.	=	Privy Council decision.
Panj.	=	Panjab High Court.
Pat.	=	Patna High Court.
Pesh.	=	Peshawar High Court, Peshawar Bench of West Pakistan High Court.
Phil.E.C.	=	Phillip's Election Cases(1780-81).
Prov.	=	Provincial.
Q		
Q.	=	Quetta Bench of West Pakistan High Court.
Q.B.	=	Queen's Bench.
Q.B.D.	=	Queen's Bench Division(1875-90).
R		
r.	=	rule.
rr.	=	rules.
reg.	=	regulation.
S		
S.	=	section.
SS.	=	sections.
Sch.	=	schedule.
S.C.	=	Supreme Court, Pakistan.
S.W.R.	==	South Western Reports(Second Series)
T		
Tr.	=	Tribunal
V		
v.	=	versus.

- Brohi, A.A.K.: Fundamental Law of Pakistan (1958).
- Backstone: Commentaries on the Laws of England (1893).
- Cornelius, A.R.: Writ Jurisdiction of Superior Courts, published in the Journal section of P.L.D. (1964).
- Dolan, D.F.: How We Elect Our President, published in the American Bar Association Journal (1956).
- Gledhill, A.: Pakistan—the Development of its Laws and Constitution (1967).
- Heinlieu, J.C.: Presidential Election Procedure, published in the Cincinnati Law Review, vol. 35 (1966).
- Holland, D.C.: Law Relating to Election Expenses, published in the Solicitor, vol. 17 (1950).
- Holland, D.C.: High Court Control of Inferior Tribunals, published in the Current Legal Problems (1952).
- Kefauver, E.: Electoral College and Contemporary Problems, published in the Law and Contemporary Problems, vol. 27 (1962).
- Khadduri + Liebesny: Law in the Middle East, Vol. I, (1955).*
- Lawson and Bentley: Constitutional and Administrative Law (1964).
- Mahmood, A.: Basic Democracies (1964).
- Martin, W.L.: Presidential Elections, Let the State Legislatures Choose Them, published in the American Bar Association Journal (1958).
- May: ~~Law, Presidential~~ Law, Privileges, Proceedings and Usage of Parliament (1951).
- McKenzie, W.J.M.: Free Elections (1958), reprint (1967).
- Memon, G.N.: Enrolment as Voter; Is the Fee Legal?, published in the Pakistan Times, Lahore, (1967).
- Monir, M.: Constitution of Pakistan (1965).
- Parker: Election Agent and the Returning Officer (1950).



Sait, E.M.: American Parties and Election (1927).

Schofield, A.N.: Parliamentary Elections (1955).

Smith, T.E.: Elections in Developing Countries (1963).

Taylor: Medical Jurisprudence (Second Edition).

Wade and Bradley: Constitutional Law (1965).

### Reports

Census Report of 1961 (Pakistan).

Constitution Commission Report, 1956 (Pakistan).

Electoral Reforms Commission Report, 1956 (Pakistan).

Franchise Commission Report, 1963 (Pakistan).

General Elections in Pakistan (1964-65) Report, 1967.

Indian Election Commission Report, Second General Elections (1957).

### Miscellaneous

Directions for Elections to the Seats for Women by the Election Commission, Pakistan.

The Federalist, No. 68, Lodge edition (1888).

Gazette of Pakistan Extraordinary.

Halsbury's Laws of England (Third Edition).

Law Lexicon by Rama Nath Aiyer, India.

Maxwell on interpretation of Statutes (1962).

Message to Congress dated 8th December, 1829, Andrew Jackson (U.S.).

President Ayub's Speech at Dacca on 2nd. September, 1965.

Pakistan Times (Newspaper) Lahore dated September, 1967.

Provincial Assembly of West Pakistan Manual (Second Edition).

Select Committee, Resolutions Proposing Amendments to the U.S. Constitution, S. Rep. No. 22 19th Congress 1st session 4 (1835).

The Times (Newspaper) London, dated 20th and 28th Feb. 1968.

- Abdul Aziz v.Md.Ali,P.L.D.1967 L:<sup>493,</sup>508,510, ~~493~~.
- Abdul Aziz v.Provincial Election Authority,P.L.D.166 D.608:  
225,455,459.
- Abdul Aziz v.S.A.Chaudhry,P.L.D.1966 D.561:456.
- Abdul Ghafur v.Nur Md.,P.L.D.1966 L.423:109,110,111,112,123,  
154,164.
- Abdul Hai v.Election Commission,P.L.D.1964 D.460:219,220,477,  
478,479.
- Abdul Hamid v.Karam Dad,P.L.D.1966 L.16:448,450,455,456.
- Abdullah,M. v.S.Sher Ali,P.L.D.1968 J.79:189,472,473.
- Abdul Qadoos v.Election Tribunal,P.L.D.1966 D.604:458.
- Abdul Qayyum v.Election Tribunal,P.L.D.1966 P.224:452,453.
- Abdul Rauf v.Abdul Aziz,P.L.D.1963 J.20:420,421.
- Abdul Shakoore v.Abdul Latif,P.L.D.1966 L.187:406,544,545.
- Abdur Rashid,v.Mahmood Sadiq,P.L.D.1966 L.216:73,74,109,110,  
111,164,461,462,545.
- Abdur Rauf v.Mukhtar,(1952)2E.L.R.340:364.
- Abdus Sattar v.S.M.Zaidi,P.L.D.1968 S.C.331:390,458,479.
- Abdus Sattar v.Chief Election Commissioner,P.L.D.1968 D.293:  
476,479,483,484.
- Abu Ahmed v.Election Tribunal,P.L.D.1968 D.430:452.
- Adityan v.S.B.Kandaswami,(1958)15 E.L.R.394;416.
- Ahmed v.Mir,P.L.D.1966 L.927:103,110,112,115,116,164,463,464.
- Ahmed Khan v.Cutodian,Evacuee Property,P.L.D.1963 K.454:509.
- Ahmedmiya Sherumiya v.Chippa Ibrahim,(1958)17E.L.R.218:286,362.



Ahmed Nawaz v.Md.Qayyum,P.L.D.1966 J.126:412.

Ahmed Saeed v.Md.Nawaz,P.L.D.1966 L.88:169,528,529,<sup>529A,</sup>530.

Ahsan Ali v.Z.A.Chaudhry,P.L.D.1966 D.41:87,99,109,110,163,417.

Akashya Narain v.Maheshwar,(1958)16 E.L.R.377:289.

Akbar Ali v.Raziur Rehman,P.L.D.1966 S.C.492:33,208,398,547,  
550,551,552.

Ali v.Khesav,(1958)16 E.L.R.154:347.

Allah Ditta v.Md.Munir,P.L.D.1966 L.770:163,164,530.

Ameer Abdullah v.Md.Yaqub,P.L.D.1967 L.722:390,458,464,465,473.

Amir Ata's Case,D.I.E.C.276:~~355~~ 469.

Amir Md.Ata Md.,(1935-50)1D.E.C.98:406,436.

Amjad Ali v.B.C.Barma,(1957)13 E.L.R.285:416.

Amritsar City Mohammedan Cases,LD.L.E.C.276:315.

Ananda Bachar v.A.R.Khan,P.L.D.1967 D.362:459,460.

Arif Iftikhar v.Election Tribunal,P.L.D.1968 L.1387:34,435,  
513,544.

Ata Ilahi v.Zohra Parveen,P.L.D.1958 S.C.298:78.

Athlone Case,(1883)3 O'M.& H.57:322.

Attorney General v.Gordon Grant & Co.,1935 A.C.532:524.

Ayeb Ali v.Election Tribunal,P.L.D.1968 D.138:318,319,459.

Ayub,S.M. v.Yousaf Ali,P.L.D.1967 S.C.486:426,435.

Azizul Hassan v.Returning Officer,P.L.D.1965 J.140:140,147.

Azmat Ali v.Chief Settlement Commissioner,P.L.D.1964 S.C.26:511

Badarul Haq v.Election Tribunal,P.L.D.1963 S.C.704:290,291,292,  
293,363,505,506,535.

Badmin Case(1869)1 O'M.& H.117:291.

Balwant Rai v.Bishan Saroop,(1958)17E.L.R.101:288.

Bassappa v.Nagappa,(1954)10E.L.R.497:421.

Begum Shamsun Nihar v.Speaker,National Assembly,P.L.D.1965 D.120:  
135.

Bhalwan Singh v.Lakshmi Narain,(1960)22E.L.R.273:333,425.

Bhi Kajee v.Brij Lal,(1955)10E.L.R.357:425.

Biresb Misra v.Ram Nath,(1956)16E.L.R.243:348.

Bishwa Nath v.Hira Lal,(1958)16E.L.R.405:308.

Blackburn Case,(1869)1 O'M.& H.198:309.

Boulter v.Kent Justices,(1897) A.C.556:455.

Braj Bhushan v.Raja Anand,(1960)22E.L.R.225:291,295.

Brecon Case,(1871)2 O'M.& H.43:290.

Buqra v.Md.Yousaf,P.L.D.1966 L.149:544.

Charlton v.Lings,(1868)4L.R.C.P.374:75.

Chaturbhuj v.Election Tribunal,(1958)15E.L.R.301:414.

Chaturbhuj v.Moreshwar,(1954)9E.L.R.301,  
A.I.R.1954 S.C.236:154,155.

Chief Commissioner,Karachi v.Sohrab,P.L.D.1959 S.C.45:508.

Cornwall Case,(1906)5 O'M.& H.225:74.

Coventary Case,(1869)1 O'M.& H.97:279,291.



Dalmia Cement Co.v.District Board,P.L.D.1958 K.211:509.

Dalmia v.Superintendent of Taxes,P.L.D.1964 K.203:509,510.

Dharanidharv.Prapdipta,(1958)17E.L.R.427:283,302,328.

Dil Md. v.Election Tribunal,P.L.D.1966 L.669:211,455,458,  
518,550,551.

Din Dayal v.Beni Prasad,(1958)15E.L.R.131:291.

Dost Md. v.Returning Officer,P.L.D.1965 L.560:33,397,520,523,  
524,525,525,526,527,528,529,545.

East Dorset Case,(1906)6 O'M.& H.22:351,355.

Edward Lionel Senanyke v.Herath,1954 A.C.640:522.

Elgin Case(1895)5 O'M.& H.1:352,358.

Faridson v.Government,P.L.D.1961 S.C.537:508.

Farrukhabad Case,L D.E.C.383;295.

Fazle Mahmood v.Md.Hussain,P.L.D.1964 L.74:405,520.

Fazalul Quader v.Shah Nawaz,P.L.D.1966 S.C.105:230.

Ferozepur Case,K.E.C.vol.2,p.187 or 2K.E.C.187:310,313.

Gairola v.Gangadhar,(1953)8E.L.R.105:364.

Galway Case,(1869)1 O'M.& H.303:309,310.

Galway Case,(1872)2 O'M.& H.46:310.

Ganda v.Sampuran,(1953)3E.L.R.17:149.

Gangadhar Maithani v.Narindera Singh,(1958)18E.L.R.124:288,289.

Gazi Neasuruddin v.A.R.Khan,P.L.D.1966 D.617:163,164.

Ghayyur Ali v.Khesav,(1958)16E.L.R.155:309.

Ghulam Abbas v.Additional Commissioner and Election Tribunal,  
P.L.D.1965 K.625:106,107,163.

Ghulam Ali v.Shafqat,P.L.D.1966 L.1028:159,551.

Ghulam Md. v.Md.Tufail,P.L.D.1966 L.576:401,402,403,457.

Ghulam Mohhiyuddin v.Chief Settlement Commissioner,  
P.L.D.1964 S.C.829:509,511.

Ghulam Qadir v.Ahmed Shafi,P.L.D.1966 L.68:74,102,163,444,  
452,455.

Ghulam Qadir v.Election Tribunal,P.L.D.1968 Q.1:98.

Ghulam Rasool v.Deputy Commissioner,P.L.D.1966 K.151:107.

Ghulam Rasool v.Ghulam Md.,P.L.D.1966 J.112:424,435.

Girdhari Lal v.Thakur Kahan,(1958)19 E.L.R.358:447.

Gloucester Case,(1873)2 O'M.& H.59:308,322.

Gokal Ananda v.Sogesh Chandra,(1958)18E.L.R.76:287.

Golghat Case,1D.E.C.405:74.

Golsack v.Shore,(1950)1A.E.R.276:530,531.

Gounder Subaraya v.Palani Swami,(1955)11E.L.R.251:322.

Great Yarmouth Case,(1906)5 O'M.& H.176:351,355.

Gurbanta Singh v.Piara,(1959)(1959)20E.L.R.350:360.

Habib Ullah v.Election Tribunal,P.L.D.1962 L.797:510.

Haider Khan v.State,P.L.D.1965 P.55:388,389.

Haji Khan v.Election Tribunal,P.L.D.1966 K.312:198,306,307,459.

Hakikat Ullah v.Nathu Shah,(1953)6E.L.R.10:117.

Hamida Begum v.Provincial Election Authority,P.L.D.1966 L.560:  
409,410,502.

Harford v.Linskey,(1899)1Q.B.852:408.

Hari Vishnu v.Election Tribunal,(1958)14ELR.147:423.

Harish Chandra v.Triloki Singh,(1956)12E.L.R.461:362.

Harper v.Secretary of State,(1955)1Ch.D.238:29.

Henry v.Galway,(1933)148L.T.453:128.

Hill v.Peel,(1869)1 O'M.& H.75:415.

Hoti Ram v.Raj Bahadur,(1958)15E.L.R.55:127.

Ibrar Hussain v.Provincial Election Authority,P.L.D.1963 P.93:  
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Iftikhar Hussain v.Md.Hussain,P.L.D.1963 J.14:424,426,433,435.

Imrat Khan's Case,(1935-50)D.I.E.C.1:387.

Imtiaz Ahmed v.Ghulam Ali,P.L.D.1963 S.C.382:522,526.

Imtiaz Ahmed v.Ghyllam Md.,P.L.D.1958 S.C.238:113,163.

Irfan v.Election Tribunal,P.L.D.1961 L.189:120.

Irfan Ahmed v.Md.Sajjad,P.L.D.1966 J.121:435.

Jaffar Khan v.Chief Election Commissioner,P.L.D.1965 P.245:  
408,418.

Jagan Nath v.Jaswant Singh,(1954)9E.L.R.231:437.

Jagan Nath v.Moti Ram,A.I.R.1951 Panj.377:74.

Jagan Prasad v.Krishna Datt,(1959)20E.L.R.443:303,332.

Jamal Shah v.Member, Election Commission, P.L.D.1966 S.C.L:

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Joy Chand v.Karma Laska, A.I.R.1949 P.C.239:552.

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Karam Dad v.Md.Yaqub, P.L.D.1965 L.622:149, 166, 167, 511.

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Khushi Md. v.Commissioner, Multan, P.L.D.1965 L.250:508.

Korb v.Fox, S.W.R.(Second Series)98:36.

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Madan Singh v. Ladhu Ram, (1955) 11 E.L.R. 99:328.

Magan Lal v. Hari Vishnu, (1958) 15 E.L.R. 205:284.

Maidstone Case, (1906) 5 O'M. & H. 200:351.

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Masudul Hasan v. Khadim, P.L.D. 1963 S.C. 203:503.

Maulana Abdul Shakoor v. Rikab Chand, (1958) 13 E.L.R. 149:127.

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Md.Saeed v.Election Petitions Tribunal;P.L.D.1957 S.C.91:  
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Md.Salim v.Land Commissioner,P.L.D.1964 B.J.15:510.

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Mir Md.v.Election Tribunal,P.L.D.1966 K.119:443.

Monks v.Jackson,(1876)1C.P.D.683:408.

Muklesar v.Sub Divisional Officer,P.L.D.1963 D.497:132.

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- Queen v. Joint Stock Companies, (1888) 2Q.B.D. 131:496.
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Rajab v.Jyotish,A.I.R.1941 Cal.41:74.

Ram Abilakh v.Election Tribunal,(1958)14E.L.R.375:347.

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Returning Officer v.G.C.Kondiah,(1960)22E.L.R.45:416.

Rex v.Electricity Commissioners,(1924)1K.B.171:454.

Rex v.Manchester Legal Committee,(1952)1A.E.R.480:455.

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Royce v.Birley,(1869)L.R.4C.P.296:155.

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Sardar Khan v.Regional Election Commissioner,P.L.D.1966 L.390:  
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